

LIBERTAS

*and the
Practice of Politics in the
Late Roman Republic*

VALENTINA ARENA

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LIBERTAS AND THE PRACTICE OF POLITICS IN THE LATE ROMAN REPUBLIC

This is a comprehensive analysis of the idea of *libertas* and its conflicting uses in the political struggles of the late Roman Republic. By reconstructing Roman political thinking about liberty against the background of Classical and Hellenistic thought, it excavates two distinct intellectual traditions on the means allowing for the preservation and the loss of *libertas*. Considering the interplay of these traditions in the political debates of the first century BC, Dr Arena offers a significant reinterpretation of the political struggles of the time as well as a radical reappraisal of the role played by the idea of liberty in the practice of politics. She argues that, as a result of its uses in rhetorical debates, *libertas* underwent a form of conceptual change at the end of the Republic and came to legitimise a new course of politics, which led progressively to the transformation of the whole political system.

VALENTINA ARENA is Lecturer in Roman History at University College London. Her work focuses primarily on Roman political thought, Roman oratory, and their relationship with the practice of politics. This is her first book.

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Translations are either mine or from the Loeb edition unless otherwise stated.

Introduction

My main purpose in the following work is to study the conceptualisations of the idea of *libertas* and the nature of their connection with the practice of politics in the late Roman Republic.¹

In what follows I am exclusively concerned with the notion of political liberty, understood as the relation between the liberty of the citizen and the power of the commonwealth, and its conflicting applications in the political debates that took place in the last period of the Republic, that is between 70 BC, the year when the tribunes of the plebs, one of the acclaimed strongholds of Roman liberty, regained their full powers, and 52 BC, the year when Pompey was elected *consul sine collega* and officially authorised to use military force *domi* to restore order in the city.² I shall therefore inevitably focus on a very limited category of people: Roman adult male citizens, the sole group which Roman society recognised as politically active agents in the civic community. It follows that when I talk about persons/individuals or members of the civic body I implicitly refer to this very limited category of people, which, regrettably but nonetheless historically, did not include women, slaves or foreigners resident in Rome.

In this period, politicians had recourse several times to claims of *libertas* as a way of characterising as well as of justifying their courses of political action.³ However, as a careful review of the political issues debated in the period under consideration shows, not all measures proposed were argued in the name of liberty. It is a crucial point, which although not unnoticed

¹ Despite a preference for liberty as a direct translation of *libertas*, on the whole I shall use the terms liberty and freedom interchangeably. On the differences between the two terms see Pitkin 1988.

² On the events of 70 BC, the first century's *annus mirabilis*, see Wiseman 1994; on those of 52 BC, whose great significance is overshadowed by the outbreak of the civil war, Asc. 34C, Dio Cass. 40.50.1, Caes. *B. Gall.* 7.1.1, Cic. *Mil.* 67, 70 and Nippel 1995: 78–84. On a revised periodisation of the late Republic see Flower 2010: esp. 135–53.

³ For an outline of the methodology applied here see Skinner 1974a (= rev. 2002: II 344–67) and Skinner 2002: I 145–57.

in previous scholarship has not been sufficiently underlined, that only certain proposals were consistently opposed, and that opposition to them was articulated by constantly referring to the ideal of liberty.

The nature of the extant sources constitutes a considerable limit to this sort of investigation. Not only are we constrained by the amount of information regarding the political debate on specific policies, which may lead us to exclude from consideration measures that may well have been discussed in the name of liberty,⁴ but the nature of the sources also forces us to come to terms with the probability of historical inaccuracy of the reported debates. The first category of sources, and to an extent the most reliable for my purposes, is made up of Cicero's published speeches. His major role in many of the political events of the period under consideration guarantees us the account of a certainly partial eyewitness of, as well as protagonist in, the debates. Bearing in mind that my central aim is to reconstruct the use of the political ideas and principles adopted in debate to justify a politician's position on particular political measures, the partiality of Cicero does not impinge on such a historical reconstruction, nor does the potential discrepancy between the delivered and published version of the speech constitute a true obstacle to this kind of research. Although, as the case of the *pro Milone* attests, there is no doubt that such a discrepancy could in fact exist, and indeed that some orations had never been delivered (such as, for example, the five books of the *actio secunda* against Verres, the *in Pisonem* or the *Second Philippic*), it is important to underline that in all these cases the orator composed the speeches to fit the actual or implied circumstances of delivery.⁵ Although in these cases they may be considered a product of fiction, the speeches were still not divorced from the historical context in which they were generated. Published at most a few years after their delivery, there can be little doubt that these speeches present arguments and ideas that a contemporary readership of members of the elite, often themselves amongst the protagonists of the events, must have found plausible as having been advocated in those circumstances.⁶ As Quintilian claims that the published version of an oration was a

⁴ See, for example, Labienus' proposal regarding the election of priests in 63 BC, and Scribonius' scheme concerning road restructuring in 50 BC. For full discussion of those cases see [Chapter 4](#).

⁵ On the publication of the *pro Milone* see, most recently, Melchior 2008; on the *actio secunda* of the *Verrines*, Frazel 2004.

⁶ See, for example, Cic. *Att.* 2.1.3 for Cicero's publication of his consular speeches in 60 BC, just three years after their delivery. On the issue of the speeches' publication see Humbert 1925, Stroth 1975, Classen 1985, Narducci 1997 and Powell and Paterson 2004. For a discussion on the process of writing up the delivered speech see Alexander 2003: 15–25.

‘commemoration of a delivered speech (*monumentum actionis habitae*)’,⁷ so the exiguous evidence regarding Cicero’s process of editing the written versions of his speeches seems to lead to the conclusion that he takes the utmost pains to represent the arguments adopted in his delivery in an accurate way.⁸ Nor can he have been alone in this. As Cicero’s *Brutus* and the well-attested use of the orations, for example, of the Gracchi or Crassus show, published speeches of other orators were used by younger speakers as a means to learn how to deliver a speech ‘under specific circumstances, before a specific audience, and on a specific issue’.⁹ As such, they must have been expected to be a plausible reflection of at least the arguments, ideas and type of rhetoric that had been used or could reasonably be expected to be used in such circumstances.

The second category of sources available for the reconstruction of the political discourse over specific policies in the period under consideration consists mainly of speeches reported in Sallust, Plutarch and Dio Cassius. Each of the three writes a different kind of historical account, and the value of each as a source should be assessed according to the conventions of their ancient historiographical genre, in compliance with which they would have been expected to insert speeches that were both rhetorically ornate and well suited to the narrative context, rather than verbatim transcripts of what had actually been said. However, this does not necessarily imply that the direct speeches they inserted are entirely the products of their imagination.

Although Sallust’s speeches, for example those of Lepidus and Macer in the *Historiae* and of Caesar and Cato in the *de Catilinae coniuratione*, are to a certain extent the result of Sallust’s own invention in matters of details, they must also have been the result of a direct knowledge, on the one hand, of what was said in those debates, and, on the other, of those arguments which the historian thought plausible as having been advocated in support of a particular political position.¹⁰ Sallust was one of the tribunes of the plebs in 52 BC, the year of Clodius’ murder, and must have witnessed the burning of the senate-house.¹¹ As Syme famously put it, ‘when a senator writes history, he knows how to render the speech of a politician’.¹² Composed by a contemporary of the intellectual world of the late Republic,

⁷ Quint. *Inst.* 12.10.51. Cf. Plin. *Ep.* 1.20.8.

⁸ See Cic. *Att.* 1.13.5, 13.44.3 and 15.1a.2 with full discussion in Morstein-Marx 2004: 24–30.

⁹ See Stroh 1975: 52–3, Classen 1985: 5–8 and Chapter 3: 126–7, 131.

¹⁰ On the historicity of Sallust’s speeches see Büchner 1982: 204–43 and esp. 241: ‘behind all speeches and letters stand historical speeches and letters’. On the role of *topoi* as conveyor of authorial voice see Nicolai 2002: esp. 50–1.

¹¹ Asc. 37C and 49C. ¹² Syme 1964: 198. See also see La Penna 1968: 325–32.

Sallust's speeches attest, if not the exact words that were uttered on those occasions, the political ideas and arguments that must have been adopted about twenty years earlier to support a specific course of action. Whilst Plutarch does not seem to indulge in entirely free licence in composing direct speeches, but appears rather to be thorough in his use of late Republican sources (which included Sulla's memoirs, the History of Asinius Pollio, and even the lost work of Cicero himself *περί ὑπατείας*),¹³ Dio, on the other hand, seems to employ considerable freedom in composing the direct speeches inserted in his historical account. In writing them he seems to adopt that 'tendency towards generality and lack of apposite details which characterises his History as a whole'.¹⁴ However, it should be borne in mind not only that had he consulted a wide range of authorities in composing his history and, as a result, had included much of historical value in his account,¹⁵ but also, and more importantly for the purpose of the present study, that the arguments that he attributed to Catulus, for example, in his speech against the *lex Gabinia* (which granted special powers to Pompey to fight against the pirates) seem to resemble very closely those that Cicero attests had been adopted in discussing a very similar issue in the following year, for the conferral of special powers upon Pompey against Mithridates.¹⁶ Here, to a certain extent, it is possible to identify a general criterion that can be applied in order to assess the value of later imperial sources in reconstructing the principles advocated in late Republican debates. Leaving aside the issue of the existence of another later source which may corroborate a point (such as, for example, the fragment preserved in Xiphilinus about Catulus, since its derivation from Dio in this case cannot be easily disproved), the unifying features of the arguments and the general homogeneity of the principles displayed may be an indication of dependence on late Republican sources. However, even if they are the result of hindsight, these later imperial sources may function as an attestation of the arguments and principles that these later authors thought appropriate and plausible to have been used in late Republican debates. Although their interests, as Dio's predilection for the relation between the βασιλεύς and the τύραννος shows,¹⁷ were not always in tune with the conceptual world of the late

¹³ On Plutarch's use of late Republican sources see Pelling 1986 = 2002: 207–36. On the Catilinarian conspiracy, Plutarch seems to have read Cicero himself, including his now lost Greek monograph: see Pelling 1985: 313–17 = 2002: 46–9.

¹⁴ Millar 1964: 83. ¹⁵ Millar 1964, Manuwald 1979: 168–79 and Lintott 1997b: 2497–523.

¹⁶ For a full discussion of the arguments see Chapter 4.

¹⁷ On Dio's speeches see Millar 1964: 78–9 and 1961: esp. 14–15. On Dio and the theme of political ideas see Lintott 1997b: 2517 and 2520. For the passages on sovereign and tyrant see Millar 1964: 79–81.

Republic, these later authors refer to ideals and principles in the representation of late Republican political conflicts which they must have perceived, on the basis of sources closer to the events, as plausible and consistent with their perception of that remote time.

What these sources allow us to reconstruct is a recurrent political pattern making consistent use of the idea of *libertas* in relation to the following issues: in opposing the granting of extraordinary powers to an individual or a group (*potestates extraordinariae*), in supporting the use of the ‘*senatus consultum ultimum*’ and in opposing land distribution. Politicians who took these political stances claimed to be acting in the name of liberty, whilst their adversaries, as is fully attested in the sources on the ‘*senatus consultum ultimum*’, argued that it was their political behaviour that was the sole guarantee of Roman liberty.

The controversies over these issues were, in essence, a struggle for political legitimation: those who opposed these measures referred to the ideal of *libertas* when they felt the need to justify their political behaviour in response to accusations of wishing to establish their dominium over the commonwealth.¹⁸ In their search for legitimation, these politicians referred to liberty as a way of characterising their political action as well as justifying it. During these political debates, politicians’ general awareness of two distinct discourses on *libertas* allowed them to frame their arguments in such a way as to demonstrate that their opponents’ actions could be classified as truly detrimental to *libertas*: based on shared assumptions, these discourses (or intellectual traditions) were sufficiently distinct to cast the issues at stake within the terms of rival conceptions of politics.¹⁹

My principal concern in what follows is to understand and fully explore the nature and dynamics of the relation between the ideal of *libertas* and associated rhetorical claims in political debates.

As the bibliography attests, the notion of Roman liberty during the Republic has already been extensively discussed, and the existing secondary literature contains some major contributions on this specific theme that have been very successful in shedding light on numerous aspects of importance, such as the nature of the ideal of political liberty and its historical development, as well as the amount of freedom that individual citizens could *de facto* enjoy.²⁰ Building on the achievements of these previous studies, the contribution I hope to make in what follows is threefold.

¹⁸ On the importance of the issue of legitimacy in the ideological struggle of the late Republic see Morstein-Marx 2009. Along similar lines see Hölkeskamp 2010: 55.

¹⁹ Pettit 1997. ²⁰ Wirszubski 1950, Bleicken 1972, Brunt 1988 and, most recently, Cogitore 2011.

First, some of the existing literature embodies a cardinal assumption with which I disagree. According to this trend of studies,²¹ since appeals to *libertas* were exclusively formulated in *ad hoc* contexts and for self-interested motives, they did not embody an abstract political *Idee* of liberty. It follows, it is argued, that it is not possible to postulate any direct link between Greek (and Roman) political thought and the reform programmes of Roman politicians, except in those circumstances when Roman politics cannot be explained by itself. By contrast, I have tried to show how political thought itself informed the discourse on *libertas*, which, in the late Republic, came to be articulated in at least two intellectual traditions.²² Drawing on Greek philosophy, these two traditions on *libertas*, which I have categorised as ‘optimat’ and ‘popularis’, although they shared the same conceptualisation of political liberty as a status of non-subjection to the arbitrary will of another person or group of persons, diverged on the institutional and political arrangements to be implemented in order to achieve and preserve the liberty of the commonwealth, and on the related issue of how much liberty each section of society is entitled to. Whilst the main authors of the ‘optimat’ tradition, despite their occasionally substantial differences, displayed a significant homogeneity as to the political reasons why the mixed and balanced constitution was the best form of government to achieve and preserve the liberty of the commonwealth, the ‘popularis’ tradition saw the civic community as the ultimate owner of all goods and empowered its institutional form, the popular assembly, to arrange their fair distribution. In what follows, alongside reconstructing the ‘optimat’ tradition, I excavate its rival tradition, the ‘popularis’, from its submergence under the overwhelming weight of the competing ideology (which ultimately prevailed in the intellectual world of the Principate), through the analysis of fragments of speeches and the reported discourse of the supporters of democracy in Cicero’s *de republica*. These attestations, however fragmentary, manifestly demonstrate a shared way of reasoning about politics which is clearly distinct from the ‘optimat’ fashion of thinking. Basing its Republican framework on a significant role for the popular assembly, this intellectual tradition advocated a form of corrective justice which required the implementation of some kind of scheme designed to secure a more egalitarian distribution of property. Ultimately, therefore, the two intellectual traditions differ in their attitude to the institutional

²¹ Bleicken 1972: 52–6 on the *ad hoc* usages, and on the relation between Greek philosophy and Roman politics 17, n.3; his view has been developed in an original fashion by Roller 2001: 213–33. See also Chapter 3: 79ff.

²² On the existence of other traditions see Arena 2011a.

arrangements, especially with regard to the role of the popular assembly and the notion of justice, around which Roman political discourse of the late Republic was organised.

By ‘intellectual traditions’ I have in mind two distinct styles of political reasoning, which were not fixed conceptions of liberty, but rather clusters of ideas held together by a ‘family resemblance’ amongst their members.²³ By referring to them as two distinct ideological ‘families’, I mean neither the ideologies of the nineteenth century nor Freeden’s morphological complexes around a given core of concepts,²⁴ but rather systems of thought, more or less coherent in themselves, that displayed distinct orientations on questions relating to fundamental evaluative terms such as liberty, justice and sovereignty.²⁵ These two intellectual traditions should not be confused with reified philosophical systems. They formed two distinct views which ultimately articulated two different conceptions of politics, but, although nourished by Greek philosophy, they should not be identified with any specific philosophical doctrine. Without requiring a personal and permanent commitment, these families of ideas provided Roman politicians with a language and conceptual framework to analyse political issues, frame their choices and justify their actions: in short, to articulate and explain their political behaviour. In this sense, I argue, it is possible to talk about the existence of ideologies in the intellectual world of the late Republic.²⁶ By understanding them, in the words of Eagleton, as ‘the medium in which men and women fight out their social and political battles at the level of signs, meanings and representations’,²⁷ the principles and rules of these ideologies do not derive from the values and beliefs of the political agents, but rather from the linguistic norms in which they are embedded. Following this line of argument, ‘conservatives’, according to Gerring’s clear example, ‘therefore, might be defined as those who evaluate the political world with a particular set of linguistic symbols, rather than those who believe in God, family, and country’.²⁸ Understanding Roman Republican

²³ I am treating the word *libertas* in the same way that Wittgenstein (2001: 31) treats the word ‘games’. For a lucid and helpful analysis of distinct intellectual families about liberty see Miller 2006: 1–20.

²⁴ Freeden 1996. For a very interesting engagement with the notion of ideology in the study of Roman rhetoric and political thought see Connolly 2007: 38–47. See also Morstein-Marx 2004.

²⁵ Nelson 2004: 18, a work methodologically exemplary in its reconstruction of a Greek tradition in Republican thought.

²⁶ For the most recent reassertion of their centrality in the political struggle of the late Republic see Wiseman 2009.

²⁷ Eagleton 1991.

²⁸ Gerring 1997: 967 which contains the most lucid analysis of the issue of definition I have found. See also Ellul 1973 with valuable remarks applicable to the ancient world.

ideologies in these terms allows us to appreciate why Roman politicians could easily adopt two diametrically opposed stances on the same issues.

These intellectual traditions provided late Republican politicians with a weaponry of terms, ideas and values that, attached to political behaviour either favourable to the *populus* or in support of senatorial *auctoritas* and combined with a certain political strategy or method (such as, for example, recourse to or avoidance of the popular assembly), might gain them the description of *populares* or *optimates*.²⁹ Of these opposing alignments, composed of socially homogeneous politicians, the latter designated politicians who stood up in defence of the *status quo* and thereby resisted new reforming measures, whilst the former described those who advanced demands for change. However, they did not constitute firmly established political groupings, much less entities more or less akin to modern political parties. Devoid of any organisational structure, single individuals might assume a certain stance in a given situation, a stance which gained them the label of *popularis*, only to act the year after (often when no longer holding the tribunate of the plebs) in such a way as to be appropriately described as *optimate*. Whatever were their motives (and they are in most cases inscrutable to us), Roman politicians had at their disposal distinct conceptual systems providing them with the political language in which to frame their struggle in search of legitimacy for their course of action, without, however, requiring any permanent commitment to a given school of thought.³⁰

The second contribution that I hope to make concerns the relationship between the appeals to *libertas* that politicians invoked in rhetorical debates as a motive for their political action, and the nature of the proposals they supported in its name.³¹ Contrary to the very common claim that in political debates each side supported opposing policies by referring to its own notion of *libertas*,³² I have tried to show that politicians on both sides of a political debate referred to a commonly shared notion of liberty, understood as a status of non-subjection to the arbitrary will of either a foreign power or a domestic group or individual. The recourse to this agreed idea of *libertas* allowed them to show that their adversaries were people of

²⁹ On *populares* and *optimates* see Strasburger 1939, Hellegouarc'h 1963, Martin 1965, Meier 1965, Serrao 1970, Seager 1972a, Perelli 1982, Vanderbroeck 1987, Burckhardt 1988, Mackie 1992, Ferrary 1997, Tatum 1999, Wiseman 1994, 2009, Robb 2010 and Duplá 2011.

³⁰ For an emphasis on the ideological features of the distinction between *optimates* and *populares* see Perelli 1982, Mackie 1992, Ferrary 1997, Wiseman 2002 and 2009, Yakobson 2004 and Duplá 2011.

³¹ For the reading of such a relationship as applied to the historical case of Bolingbroke versus Walpole see Skinner 1974a (= rev. 2002: 1 344–67).

³² See, for example, Morstein-Marx 2004: 221 and the remarks in Wallace 2009: 175. A few exceptions to this general trend are Mackie 1992, Ferrary 1997 and Cogitore 2011: 106, who, however, does not fully explain the dynamics of the relation between such claims and the adopted practice of politics.

blinker political sensibilities, since they did not realise that in virtue of the very same value that they themselves cherished the most (the idea of liberty as a state characterised by the absence of a condition of domination) the policies that they advocated could plausibly be described as detrimental to liberty. This is the reason why these politicians did not resort to the openly constitutional argument of wishing to restore, advance or simply preserve the mixed and balanced constitution at the centre of the 'optimate' intellectual tradition on *libertas*. If they succeeded in showing that the policies that they resisted could reasonably be presented as constituting a true threat to a shared notion of liberty, they might hope to be successful in presenting themselves as the real defenders of this very same value.

In other words, what I hope to illustrate is that the politicians' ability was not only to recognise the need to justify their political actions by some accepted political principles, but also to recognise that the principle of liberty was already normative within their society and capable of legitimating (at the same time as describing) certain political courses of action. In turn, these politicians perceived that if they concentrated on these particular policies, that is *potestates extraordinariae*, the '*senatus consultum ultimum*' and land distribution, they would have the best chance of making their adversaries' behaviour appear detrimental to *libertas* by virtue of the shared notion of this value, the beliefs also held by their enemies. Their most effective move was to perceive that, according to the common understanding of liberty and of the means by which it could readily be lost, their adversaries could be presented as pursuing policies which could be made appear as jeopardising such a liberty. Their corresponding strategy consisted of relentlessly pursuing precisely those policies, the importance of which thereby came to be magnified, and provided them with the opportunity to present themselves as the true defenders of Roman liberty. If, as I argue, their ability consisted of matching their political project to their available linguistic resources in such a way as to be able to show, with the greatest degree of plausibility, that their opponents were pursuing policies liable to endanger the liberty of the commonwealth, it follows that the ideal of *libertas* should be considered as one of the causal conditions of political actions, regardless of the political agents' true beliefs.

It is one of my aims to show that contrary to the idea that *libertas* was a vague word to which politicians paid lip-service in their search for power,³³ adopted to provide *ex post facto* justifications for their behaviour,

³³ This view is symbolised by the icastic words of Syme 1939: 39 'liberty and the laws are high-sounding words. They will often be rendered, on a cool estimate, as privilege and vested interests' and at 155

the recourse to the principle of liberty as justification for their action guided the politicians' behaviour in ways that were compatible with those claims of liberty.

An influential reading of Roman political culture, interpreting the ideal of liberty as a mere epiphenomenon which should be bypassed if one wishes to investigate real rationale of political behaviour, the Realpolitik, has been opposed by those who have argued that Roman politicians did indeed believe that their chosen political conduct could preserve the liberty of the commonwealth.³⁴ Reviewing twentieth-century scholarship, responsible in his opinion for the artificial creation of an 'ideological vacuum' in Roman political culture, Wiseman effectively summarises: 'so Gelzer gave you the norm, aristocrats exploiting connections and patronage to get their consulship, and Syme gave you the crisis, as power was usurped by "chill and mature terrorists"'. Either way, you were not to suppose that there were causes that men would die for.³⁵ The line of argument, he observes, that a '*popularis*' political attitude could further one's career and satisfy political ambitions, goes against the most patent observation that those who chose it and acted as radical tribunes, such as Tiberius and Gaius Gracchus, Saturninus, Livius Drusus, Sulpicius and Clodius, were all murdered before they could reach the pinnacle of the *cursus honorum*, the consulship.³⁶

By contrast, I have tried to show that regardless of whether or not it is possible to show that *libertas* genuinely acted as a motive for engaging in a certain course of political action, it is necessary to refer to the principle of liberty in order fully to understand that action. If one view, historically formulated by Syme, considers that liberty seldom played a role as a genuine motive for action, and hence can be bypassed in historical research, and the contrary view, recently reinforced by Wiseman, claims that liberty indeed often served as a genuine motive for action, and hence should not be sidelined in our studies of Roman political history, my contention is that the principle of *libertas* played a central role each time that Roman politicians believed they needed to provide an explicit justification for their political behaviour.

'*libertas* is a vague and negative notion – freedom from the rule of a tyrant or a faction. It follows that *libertas*, like *regnum* and *dominatio*, is a convenient term of political fraud.' Most recently, see, for example, Wallace 2009: 175.

³⁴ Wirszubski 1950: 65 (in regard to Tiberius Gracchus, Cato and Cicero) Brunt 1971b, de Ste Croix 1981: 332–72 and Millar 1998.

³⁵ Wiseman 2009: 31. Syme 1939: 191 and Gelzer 1912 and 1962.

³⁶ Wiseman 2009: 30.

Finally, the third contribution I hope to make concerns the conceptual effects of the uses of *libertas* in the political debates of the late Republic.

Contrary to the very well-established view that ‘no new ideas or principles were developed in the course of the contest between the *optimates* and the *populares*’,³⁷ I argue that as a result of its adoption in the debates concerning the recourse to the ‘*senatus consultum ultimum*’, the principle of *libertas* was subjected to a form of conceptual change. Initially applied, in virtue of its ordinary meaning, to a set of circumstances where it was not normally expected to be found (such as circumstances where the rule of law and specifically the right to *provocatio* were not upheld), *libertas* underwent first an alteration of the set of references to which it could be applied in virtue of its agreed criteria, and, in the second instance, a modification of these very criteria, which ultimately generated a form of conceptual change.³⁸

Although the idea of *libertas* maintained its basic meaning unaltered, that of a state of non-domination, by the 40s, the means which were regarded as being of primary importance in establishing and maintaining such a state had changed. Moving away from a juridical notion, the idea of *libertas* no longer implied an emphasis on the rights of Roman citizens (such as, for example, the right to *provocatio* and to *suffragium*) as the guarantors of its establishment and preservation, but rather acquired a new moral and universalistic dimension, centred round the *iudicium* of individual men.³⁹

After an initial state of semantic confusion, caused by what may have appeared at first to be an idiosyncratic application of *libertas*, politicians who supported the recourse to the ‘*senatus consultum ultimum*’ succeeded in persuading their audience (in the first instance, their direct political adversaries, but also those gathered in the Forum and in *contiones*, as well as the readers of speeches, understood in short as the wider language-sharing community) to accept the application of the term *libertas* to a new situation in which they had not previously thought it could be applied, and finally sanctioned a form of conceptual change. It follows that it was the audience, in the sense of the language-users, that acted as the ultimate authority which regulated and enforced the conceptual change undergone by the idea of liberty. By endorsing the exclusion of the objectivity of law

³⁷ Wirszubski 1950: 64. For an exception to this trend see Ferrary 1982.

³⁸ Here I am drawing on Skinner’s methodology on conceptual change. See Skinner 2002: 1 158–87.

³⁹ Arena 2007 and most recently Cogitore 2011: 200–2. See also Stacey 2007: 23–72 with particular focus on Seneca.

as an entity above anyone's judgement, an exclusion advocated by those who supported recourse to the '*senatus consultum ultimum*', the people sanctioned a new social perception of a state of affairs which would before have appeared unacceptable, and, by doing so, ultimately acted as one of the engines of social change.

It follows, therefore, that in this work I am not concerned with the role of the people as more or less passive consumers of political ideology, or with the exact social identity of those who gathered in *contiones* to listen to these debates. In other words, since I focus on the rhetorical uses of the idea of *libertas* by members of the elite, my study is not meant to be a direct contribution to the very lively debate on the nature of Roman political culture.⁴⁰

However, I do argue that the Roman people, understood as language-users, played a central role in Roman political culture not only as active construers of legitimacy (given the centrality of political beliefs and values as a source of legitimacy),⁴¹ but also as the ultimate authority that sanctioned conceptual changes. Following the ancient theorists of language, I try to show that in the debates over recourse to the '*senatus consultum ultimum*' the decisive factor leading to the prevalence of one description over another must be identified in *consuetudo*, the way language was used by the speaking community.⁴² *Consuetudo*, according to the ancient texts, derived its force from the *consensus multorum*, that is the consensus amongst all those described as able to recognise the composite nature of nouns that were immediately graspable (such as, for example, *argentifodinae* or *viocurus*), as opposed to a restricted elite of profound knowledge.⁴³

By prompting a positive view of a state of affairs where the rule of law was not upheld, the *consuetudo* of the language-users enacted a change in social perception: by embracing the rhetorical description of those who supported recourse to the '*senatus consultum ultimum*', the language-users opened a very dangerous breach in the intellectual world of the Republic, and legitimated actions that contributed to the transformation of the Roman *res publica*.⁴⁴

⁴⁰ On this debate, famously originated by a series of articles by Millar (now collected in Millar 2002a) and culminating in his 1998 work, see North 1990a and 1990b, Jehne 1995 and 2006, Flaig 1995 and 1998, Pina Polo 1989 and 1996, Laser 1997, Pani 1997, Yakobson 1999, Mouritsen 2001, Morstein-Marx 2004 and Hölkeskamp 2010.

⁴¹ Morstein-Marx 2009: 135–8.

⁴² For Varro see Diomedes *GRF* Funaioli 268 = Diom. Gramm. 1.439.15ff. and Char. *gramm.* 62.14ff. = 115 G.-S; Cic. *De or.* 3.170; Quint. *Inst.* 1.6.2–3; August. *Ars br.* 3.25.

⁴³ Varro *Ling.* 5.7. See Epilogue: 266ff.

⁴⁴ For the usefulness of the notion of transformation as applied to the Roman Republic see Morstein-Marx and Rosenstein 2006: 625–37.

If the *auctoritas* of the orators resulted in the application of *libertas* to a state of affairs where it was not at first expected, the *consuetudo* of the speaking community accepted it, thereby legitimating a form of political behaviour which, by making Octavian's actions ideologically possible, ultimately acted as one of the engines of social and political change.

Roman libertas

Since in Rome during the late Republic, as we shall see later, the political liberty of both the citizens and the commonwealth was conceived in terms equivalent to those of the juridical conditions of liberty and slavery, it is important to begin with the notions of *libertas* and slavery that were adopted in Roman legal discourse.¹

In the late Republic, all Romans shared a basic understanding of the value of liberty: they agreed that fundamentally *libertas* referred to the status of non-slavery.²

As Patterson and Raaflaub have shown, the conceptualisation of liberty and its rise to prominence within the socio-political discourse of ancient societies took place in conjunction with the historical development of slavery, and its subsequent modifications were directly influenced by the historical development of this institution.³ In early Rome in particular, a society consistently ‘open’ to the contributions of foreigners, slavery provided the fundamental social category by the means of which membership of the Roman community was circumscribed and defined. As attested by the archaic Twelve Tables, which in the first century BC were still learnt by heart by schoolboys, and whose ethos and principles permeated the upbringing of every educated Roman, a Roman citizen was conceived as the polar opposite of a slave. He could not be sold into slavery for debt within Roman territory, but should be taken *trans Tiberim*, that is outside Roman territory, for this transaction to take place.⁴ With Rome’s

¹ See [Chapters 2 and 3](#).

² A long-established fact (Mommson 1887: III 62, reformulated by Wirszubski 1950: 1–2), in recent years recurrently stated in studies on ancient slavery.

³ Patterson 1991 and Raaflaub 2004.

⁴ On the openness of early Roman society see Dench 2005. On the Twelve Tables see Crawford 1996: 40, II 555–721. On the issue of whether the archaic formula *trans Tiberim* referred to Latin territory or even beyond into Etruria see Cornell 1995: 281. De Martino 1974: 170–1 holds the opposite view that an individual could be enslaved for debt within Roman territory. On the role of the Twelve Tables in the late Republic see Cic. *Leg.* 2.9, 59.

territorial expansion from at least the fourth century BC onwards and its increasingly more distinct nature of slave society, especially from the third century onwards, the notion of *libertas* came to designate the status of non-slavery.

The definitional dichotomy between *libertas* and slavery was elegantly formulated in the juridical texts of the imperial era.⁵ In the *Digest*, the chapter *de statu hominum* begins by stating the fundamental division concerning the juridical status of mankind: 'the principal division in the law of persons is the following, namely that all men are either free or slave (*summa itaque de iure personarum divisio haec est, quod omnes homines aut liberi sunt aut servi*)'.⁶ It then specifies that 'men who are free are either freeborn, that is they are free by birth, or freedmen, namely those who have been manumitted from legal slavery (*alii ingenui sunt alii libertini. Ingenui sunt qui liberi nati sunt, libertini, qui ex iusta servitute manumissi sunt*)'.⁷ Furthermore, according to the *Digest*, to be free, either by birth or by legal manumission, consists in the natural ability 'to do whatever one wishes unless prevented from doing so by physical impediment or law'.⁸ This ability is possessed when one is in the status of non-slavery: when one is not under the *dominium* of someone else. 'Slavery,' continues Florentinus, 'is an institution of the law of nations by means of which anyone may be subjected, contrary to nature, to the control (*dominium*) of another (*libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur*)'.⁹ It follows that, according to the *Digest*, one is free when he is under his own *dominium*.¹⁰

According to these juridical texts, a slave was a human *res*, who, in virtue of the *ius gentium*, lived in a condition of domination. The essence of this condition resided in the inability of the slave to conduct his life by his own

⁵ Skinner 1998: 38 rightly draws attention to Roman juridical texts and their influence on later authors regarding the conceptualisation of liberty.

⁶ *Dig.* 1.5.3 = Gai. *Inst.* 1.9. In treating the *ius personarum* Gaius deals with the rules governing how a person attains and loses various positions of status in Roman society; see Buckland 1921: 58–9 and Jolowicz 1957: 66–9.

⁷ *Dig.* 1.5.6 = Gai. *Inst.* 1.10–1.

⁸ *Dig.* 1.5.4 = Florentinus *Institutes* 1x.

⁹ *Ibid.* On the reference to a '*naturalis facultas*', where *naturalis* is perhaps interpolated see Wirszubski 1950: 2. For the views of Roman jurists on slavery see Garnsey 1996: 25–6, 64–5, 90–7. A similar view concerning the power over the slaves as part of the *ius gentium*, that it is to be found not in nature, but rather in the institutions of the vast majority of people, is also expressed by Ulpian in *Dig.* 50.17.32.

¹⁰ Cf. also Marcianus in *Dig.* 1.5.5. For the substantial homogeneity on this topic between Gaius' *Institutiones*, Justinian's *Institutiones* and the *Digest* see Melillo 2006: 14–16, who does however underline the small but significant variation in the title of the *Digest*, with *de statu hominum* in place of *de iure personarum*. See also Gardner 1993.

will, let alone by extension to control the life of other *servi* or *personae*. He was thereby completely bereft of any legal right which might have preserved him from the exercise of arbitrary interferences with his choices.

As Buckland rightly observed, the legal texts refer to the condition of slavery as that of a *servus* under *dominium* and not under a *dominus*, a development that should probably be dated to the end of the Republic.¹¹ The distinction is important. 'The statement that slaves as such are subject to *dominium* does not imply that every slave is always owned. Chattels are the subjects of ownership: it is immaterial that a slave or other chattel is at the moment a *res nullius*.'¹² In the late Republican conceptualisation of the condition of slavery its defining trait, therefore, does not reside in the actual presence of an owner, but rather in the inability of the slave to be *dominus* of himself, that is to conduct his life according to his wishes.¹³ The rather peculiar group of the *servi sine domino* is a case in point. Although primarily an imperial phenomenon, of the four categories in which they can be gathered – the slaves abandoned by their owner, who could then be acquired by *usucapio*; the *servi poenae*, who, having been convicted, were strictly *sine domino*; the slave manumitted by one owner, whilst another also had a right in him/her; and the free man who was given in usufruct by a fraudulent vendor to an innocent buyer – only the latter seems to have been in existence in the late Republic.¹⁴ Although a rather uncommon phenomenon at the time – only one case is reported by Quintus Mucius, a unanimously accepted correction of the transmitted *Quintus meus*¹⁵ – its existence, together with the additional cases attested in the imperial period, represents an important facet of the conceptualisation of slavery (and, by implication, of liberty). It was not the actual presence of the owner, but rather the lack of any right against the exercise of arbitrary interferences in one's own life that was the defining trait of the condition of slavery. None of the *servi sine domino* were under the specific ownership of someone. However, they were all equally unable to conduct their lives according to their own wishes.

It is important to observe that according to these juridical texts, from a purely conceptual point of view, those who had been enslaved and freed, the *liberti*, belonged to the same category as those free by birth. The fact that a slave of a Roman citizen, when formally manumitted, would

¹¹ See *ThLL* 5.1: 1892. ¹² Buckland 1908: 3. ¹³ *Contra* Roller 2001: 220.

¹⁴ Watson 1967: 166–71 deals with the passage from a Republican perspective. The categories of the *servi sine domino* are fully analysed, with a special emphasis on the empire, by Buckland 1908: 277–8, 579–80.

¹⁵ See *Dig.* 40.12.23 pr.

become *ipso facto* a Roman citizen himself was a peculiar Roman trait, which provoked the admiration and stupefaction of foreign powers as well as of Greek authors.¹⁶ Importantly for the present argument, as Roman citizens, freedmen were endowed with the same basic civic and political rights as *cives Romani*, and, although it seems that in Rome they themselves (as opposed to their sons) were debarred by law from office-holding, none of them was deprived of the right to vote (although, for almost the whole of the late Republic, their political power was limited by their confinement with the urban plebs to the four urban tribes).¹⁷

Although *liberti* brought with themselves the mark of their condition and often conducted a life of *de facto* dependency on the will of their patron, from a conceptual point of view were regarded as free, provided that they had been manumitted regularly.¹⁸ The considerable emphasis laid on the legality of the procedures of manumission as well as the conceptualisation of the services required by their patron from the *liberti* show that the status of the *liberti* was conceptualised in terms of independence from the will of their former *dominus*.

As Gaius attests, ‘a slave in whose person these three conditions are united, thirty years of age, quiritary ownership of the manumitter, liberation by a civil and statutory mode of manumission, that is by the form of *vindicta*, by entry on the censor’s register, by testamentary disposition, becomes a citizen of Rome: a slave who fails to satisfy any one of these conditions becomes [after Augustus] only a Latin’.¹⁹ Although the historical development of these three forms of manumission is still the subject of scholarly debate, it is usually agreed that, by the time of the late Republic, all three forms of regular manumission granted Roman citizenship to ex-slaves.²⁰

¹⁶ See the often cited reaction of Philip of Macedon in 214 BC in *SIG* 543, Dion. Hal. 4.22ff. and App. BC 2.120. On this point, Millar 1995. On the effects that manumission had on Roman society and on the Roman discourse about slavery see Mouritsen 2011.

¹⁷ For a detailed analysis of the freedmen’s limitations in the military and political sphere in Rome as well as in municipal towns see Mouritsen 2011: 71–80. None of these limitations applied to the *liberti*’s children who enjoyed full legal parity with men who boasted an indigenous grandfather. Cf. Berger 1953: 560 on the *lex Terentia* of 189 BC, which had given children of freedmen citizenship *optimo iure Quiritium*. Treggiari 1969: 68. Crawford 1996: I. 1. at 31–3 shows that *liberti* could act as witness in a trial *de repetundarum* unless *in fidem* of the defendant, however not as jurors. The freedmen’s voting right is emphasised by Millar 1995c. On the proposals to distribute freedmen throughout the thirty-five tribes see Arena 2006.

¹⁸ See Mouritsen 2011, the most recent treatment on the subject. ¹⁹ Dig. 4.5.4 = Gai. Inst. 1.17.

²⁰ Cf. Cic. *Top.* 10, Ulp. *Reg.* 1.6–9 and *Frg. Dos.* 5 (for the text of which see below). Fabre 1981: 5–24 summarises the various hypotheses. See also Masi Doria 1993: 11–15. See Volterra 1956: 695 (= 1991: 395) where the consequences of Roman manumission find parallels in other ancient legal systems. Most recently Herrmann-Otto 2005: esp. 66–74.

Alongside a list of the formal modes of manumission (*iusta manumissio*), and the emphasis on the conferral of Roman citizenship on all those who had been freed according to these modes, the fragmentum Dositheanum also states that those who gained their liberty *domini voluntate*, exclusively at their master's will, retained their condition of slaves (*hi autem, qui domini voluntate in libertate erant, manebant servi*).²¹ This reference to those irregularly manumitted, transformed in the Augustan period to *Latini Juniani*, makes explicit an essential aspect of the definition of the status of *libertas*.²² This was a status which could not depend on the goodwill of the *dominus*, that is, the granting of the status of *libertas* itself could not be subjected to an arbitrary judgment, but was rather protected by the official rules gathered under the label of *iusta manumissio* and which involved, at least symbolically, the whole community.

If, on the one hand, the extensive section on manumission of the fragmentum Dositheanum (whose overall accuracy is often rightly doubted by scholars) seems to go back to a classical elementary treatise, Gaius, on the other, provides us with an explicit attestation of how in the late Republic before the passage of the Augustan *lex Iulia*, those irregularly manumitted were conceived of as slaves.²³ 'Those who are now termed Junian Latins,' says Gaius, 'were in earlier times slaves by Quiritary law, but they were maintained in apparent freedom by the praetor's intervention (*olim ex iure Quiritium servos fuisse, sed auxilio praetoris in libertatis forma servari solitos*).'²⁴ Thought of as slaves, they received only a *forma libertatis*, that is an appearance of liberty, guaranteed by the praetor who prevented their *domini* from claiming them back.²⁵ The *dominus* who had granted freedom to his slaves by a unilateral act had renounced his right over them, and thus had put himself in the position of being unable to compel them to work full time to his own advantage (as attested, for example, in comedy), and, in more general terms, to force them to act as slaves. If he had done so, the praetor, a magistrate theoretically elected by the whole community, could

²¹ *Frg. Dos.* 5. See also Gai. *Inst.* 3.56.

²² The *lex Junia*, most probably dated to 17 BC, regulated the status of these slaves irregularly manumitted, and assigned them Latin status, but not Roman citizenship, thereby putting them on an equal footing with the *Latini coloniarii*. On the *Latini Juniani* see Buckland 1908: 533–7, De Dominici 1973 and López Barja de Quiroga 2007a: 72–5 and 2007b.

²³ Honoré 1965 advances the hypothesis that the author could be Gaius himself. See also Berger 1953: 476, Dionisotti 1982; Balestri Fumagalli 1985, Nörr 2000: esp. 196–200 and, most recently, Flammini 2004. On the way the condition of the *morantes in libertate* was conceptualised in the late Republic see López Barja de Quiroga 2007a: 89 and Mouritsen 2011: 85–6.

²⁴ Gai. *Inst.* 3.56.

²⁵ *Frg. Dos.* 5. Cf. Ando 2011: 12 who translates *auxilio praetoris in libertatis forma servari* (Gai. *Inst.* 3.56) as 'to be protected in a framework of freedom by the aid of the praetor'.

have intervened in the slave's favour, enacting a measure that should be understood as directed against the master, who had forfeited his right over the slave, rather than in favour of the slave whose condition of servitude was theoretically unchanged.

It follows that from a conceptual point of view the granting of liberty could not simply rest on the *voluntas* of the *dominus*, whose consent was a necessary, but not sufficient, condition for freeing a slave and granting him Roman citizenship.²⁶ In order to make the status of liberty a lawful acquisition, its conferral had to be removed from the arbitrariness of the master's will and assigned to the sanction of official procedures, which guaranteed its legality and provided the legitimization of the community.²⁷ At least in their earliest forms, all three formal modes of manumission, which conferred *libertas* and *civitas*, were theoretically construed in such a way as to include the watchful participation of the community: the *manumissio vindicta* required a ratification by a magistrate (who could theoretically be a dictator, a consul, an interrex or a praetor, or even a proconsul or a propraetor), the *manumissio testamento* required the confirmation of the will by the *comitia calata*, and the *manumissio censu* depended upon enrolment by the censors. Of the three modes of manumission in the late Republic, however, the last, although undoubtedly still practised, must have been the least attractive, given the very erratic performance of the census in the late Republic.²⁸ Meanwhile the *manumissio testamento* must have undergone important modifications, since the *comitia calata* had ceased functioning and, as far as it is possible to reconstruct from the available evidence, was the least popular of the three forms of legal manumission.²⁹ Although the practice of manumission varied with time, the principle according to which the granting of liberty (and citizenship) to the freed slave should not be subjected solely to the arbitrary will of the master was ingrained in the Roman conceptual world.³⁰

²⁶ Cic. *De or.* 1.183, Ulp. *Reg.* 1.8 and Boeth. *In Cic. Top.* 1.289. See Daube 1946 who also underlines how, at least theoretically, the censor could probably free a slave without his master's consent (as in the case of bondsmen) as could also other magistrates in the case of slaves who had deserved well of the commonwealth. Cf. Cic. *Balb.* 24.

²⁷ See Treggiari 1969: 20–31. Mouritsen 2011: 69 underlines how in practice (rather than in theory) the presence of the officials 'merely recognised and confirmed the change of status rather than actually effecting it'. Along similar lines see López Barja de Quiroga 2007a: 112. *Contra* Sherwin-White 1973: 324.

²⁸ Cic. *De or.* 1.183. See also *Frg. Dos.* 7. On the issue Watson 1967: 185–200.

²⁹ Mouritsen 2011: 180–5.

³⁰ See Dion. Hal. 4.24.4–8 who, in his attack against contemporary manumission practices, proposes that censors or consuls oversee the manumission process, inquiring into those who are freed and the reasons for their manumission.

Although there can be little doubt that the freedmen's experience of liberty found *de facto* numerous limitations of various kinds,³¹ in Roman juridical discourse freedmen were conceptualised in all respects as free, that is not under the domination of anybody except themselves. Even the practice of *operae*, numbered days of labour for the patron, and *obsequium*, a freedman's act of reverence (whose scholarly interpretation ranges from a legally enforced duty to the lack of transgression and even a rather vague demonstration of respect), although in practice they may have considerably curbed the liberty experienced by the freedmen, were conceptually construed as a result of a mutual agreement between the two parties, and as such as not arbitrarily interfering with freedmen's lives.³² Irrespective of its legal technicalities, in the late Republic *obsequium* was not required from all freedmen, but only from those who had struck a specific agreement with their patrons.³³ At the time of manumission, the patron and the *libertus* entered a *societas*, where the patron contributed the gift of freedom and the *libertus* agreed to provide him with *obsequium*.³⁴ How many *liberti* actually stipulated this agreement, and whether its stipulation was a simple formality (which in practice simply covered up the practical dependence of the *liberti* on their patron), should not obscure the important conceptual framework within which the reality of *obsequium* was cast: the *stipulatio* of a voluntary agreement between two parties, the fulfilment of which was protected, as in the case of any other legal transaction, by a series of legal measures and rights – for example, in the event of the freedman's failure to obey, by the acquisition of certain rights over his property on the part of the patron.

Equally, the patron's privilege of exacting *operae* from his own ex-slave sprang not from the latter's status of *libertus*, but rather from an oath he had taken at the time of manumission. In fact the obligation arose from their mutual stipulation and the *ius iurandum liberti*, a unilateral oath taken by the freedman, which confirmed the promise he had made before

³¹ On the various forms and degrees of limitations see Watson 1967: 226, Treggiari 1969: 81–2 and Mouritsen 2011: 36–65.

³² For the first (legally enforced nature) see, for example, Lambert 1934 and more recently Watson 1967: 228ff.; for the latter (lack of transgression and act of respect) see Treggiari 1969: 70 and Mouritsen 2011: 58. On *liberti* and the issue of citizenship, *obsequium* and *operae* see more recently Levi 1981 and Masi Doria 1993.

³³ Treggiari 1969: 70.

³⁴ Dig. 38.2.1. See also Dig. 44.5.1.5: Rutilius, or another praetor, sometime after 118 BC severely limited the actions that could be brought to secure the *libertus*' obedience if a *stipulatio* had been made, on the ground that it was *onerandae libertatis causa*. On this passage see Cosentini 1948–50: 1 8off. and 190ff. and Treggiari 1969: 70–1. Dig. 38.1.36: Labeo held these *societates* void. On this issue see Watson 1967: 228–9.

manumission, since at that time his promise could not be considered legally valid.³⁵ The *operae*, each of which technically represented one day's work,³⁶ were regulated by a series of detailed rules, dictated by the interests of both parties. The conceptual basis for *operae* was probably first formulated in the praetorian law of the Republican period, from which the basic notion of equity was derived.³⁷

It follows that *obsequium* and *operae*, which can be interpreted (and probably acted in real life) as legal enactments formalising the dependence of the *libertus* on his patron, were conceived in such a way as to preserve the basic notion of the *status personarum* according to which a *libertus*, legally manumitted, was a free Roman citizen.

In fact, the status of every man could be conceptually categorised according to the strict dichotomy between *libertas* and slavery.³⁸

As Brunt has rightly stated, there is some justification for saying that men who were not chattel slaves, but were *de facto* subject to different degrees of someone else's power, were in some sense free.³⁹ The *auctorati*, Roman citizens who bound themselves by contract to serve as gladiators, chose to submit themselves to the wishes of their employers.⁴⁰ Although they found themselves in a condition which could in practice be equated to that of servitude, from a conceptual point of view, they were not unfree. Having agreed by contract to renounce living according to their own will, the *auctorati* had not placed themselves in a condition of subjection to arbitrary interference, but had given their own assent to a condition which was defined, also in its temporary limitations, by contract. In fact, they seem likely to have retained both the right to *provocatio*, the legal protection against arbitrary punishment by magistrates, and *conubium*. Moreover, if they survived the time they were bound to fight by contract, they were restored to their previous status.⁴¹ Equally, the *addicti* or debt-bondsmen (Roman citizens fallen into a temporary condition of slavery because of debt) held a very similar status to that of the *auctorati*, whose rights they most probably also enjoyed. The juridical status of the *addicti*, just as that of the *auctorati*, was conceptually framed in such a way as to emphasise

³⁵ *Dig.* 38.1 and *Cic. Att.* 7.2.8.

³⁶ *Dig.* 38.1.1 and 38.15.24, which provides examples of amounts of work numbering 1,000 or 100 *operae*.

³⁷ Treggiari 1969: 71.

³⁸ On the 'intermediary states' see Buckland 1908, Watson 1967 and 1987 and Wieling 1999: 15–16 and 25–6. On the issue of self-sale see Ramin and Veyne 1981.

³⁹ Brunt 1988: 286.

⁴⁰ *Sen. Ep.* 37.1 and *Petron. Satyr.* 117; other evidence in Mommsen 1905–13: III 9 n.4.

⁴¹ Brunt 1988: 287.

the absence of arbitrariness on the part of the creditor. From a theoretical point of view, the *addicti* voluntarily renounced the right to conduct their lives according to their own will and entered a pact with their creditors, which would have also provided them with the opportunity to return to their previous status by their own labour or, at least, by the payment of the *pecunia* that originated their condition of *addictio*.⁴² Although the scanty sources on the topic indicate that the *addicti* experienced a condition of *de facto* servitude – Quintilian and another rhetorician, the Ps.-Quintilian, describe their condition ‘in servitude’ until they had paid off their debts, and Columella portrays them as kept *in ergastula* while working on estates⁴³ – the status of the *addicti* could be conceptualised as the condition of those who had given their consent to enter into a relation established by a legal agreement.⁴⁴ It follows that those who had become *auctorati* and *addicti* had been subjected to a *capitis deminutio minima*, that is while undergoing a modification of their juridical status, they retained their citizenship and freedom.⁴⁵

If all this is applicable to Gaius’ categorisation of men under the heading of *libertas*, according to which all men are either free (*ingenui* or *libertini*) or slaves, a slightly different picture is found when we turn to Gaius’ classification of men under the heading of *familia*, where the servile condition is described as a condition of subjection to *alieno iuri* or even *in aliena potestate*.

In his *Institutiones*, Gaius adds a second division of the law of persons, according to which ‘some persons are their own masters, and some are subject to the authority of others (*sequitur de iure personarum alia divisio. Nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae*)’.⁴⁶ ‘Of those persons who are subject to the authority of another,’ Gaius continues, ‘some are in power, others are in hand [marital subordination] and others are considered property [or in bondage] (*earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in*

⁴² Papinian in *Coll.* 2.3.1. See also Livy 23.14.3, Flacc. 45 and 48; FIRA 19, XXI–XIII; 21, LXI. See also Brunt 1988: 285–6 and Peppe 2010: esp. 473–82.

⁴³ On the relation between the description of the *addicti* and that of the *nexi* of old, whose release from debt-bondage was described as a new beginning of liberty, after the expulsion of the kings, see Brunt 1988: 285–6.

⁴⁴ This could be the interpretation of Quintilian’s reference to a *lex*, which bound the *addicti* to act as slaves until they had repaid their debts, but of which there is otherwise no trace in the jurists. Quint. *Inst.* 7.3.26 refers to the *addictus* ‘*quem lex servire donec solverit iubet*’, cf. 5.10.60; Columella 1.3.12.

⁴⁵ For cases of *capitis deminutio minima* in the late Republic see Cic. *Caec.* 98, *Dom.* 77 and *De or.* 1.181.

⁴⁶ Gai. *Inst.* 1.48.

mancipio sunt).⁴⁷ It follows that according to this classification only the *paterfamilias*, and the woman whose father has died and is not *in manu*, are *sui iuris*, that is in possession of all legal rights, allowing them not to be in a condition of subjection to anybody else. The other members of the *familia* are all subject to the authority of another (*personae alieno iuri subiectae*), and are thereby ultimately unfree.

In presenting the powers of the *paterfamilias*, distinguished by the terms *potestas*, *manus* and *mancipium*, Gaius states that *potestas*, in its double nature of *dominica potestas* and *patria potestas*, consisted in the father's extensive powers over his children and slaves;⁴⁸ *manus* referred to his power over the wife, who was effectively placed on the same footing as that of the *filiafamilias*, while *mancipium*, also used as a word to indicate a slave, designated the status of a *filiusfamilias* who had been sold by his parent as bondsman (but whose condition was technically *in potestate*). Those who were under the authority of someone else could be subjected on an arbitrary basis to interference with their own choices; they were, ultimately, in a condition of servitude. 'The dominating party can practise interference, then, at will and with impunity: they do not have to seek anyone's leave and they do not have to incur any scrutiny or penalty.'⁴⁹ A slave is always *in potestate*, hence subjected to someone's else will. 'Slaves are in the power of their masters and this power is acknowledged by the Law of Nations, for we know that among all nations alike the master has the power of life and death over his slaves, and whatever property is acquired by a slave is acquired by his master (*in potestate itaque sunt servi dominorum. Quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse; et quodcumque per servum acquiritur, id domino acquiritur*).'⁵⁰

However, as Roman comedies well show, a *dominus* does not always interfere with his slave's choices.⁵¹ The stereotypically cunning slave in Plautus, for example, thanks to his shrewdness, may be able to get away with whatever he likes, despite being undoubtedly in a condition of slavery. His state is manifested in the fact that he has a master, who can act, if he so wishes, at his whim and with impunity against the slave, and to that extent the latter will always remain unfree. In other cases, Plautus presents situations where the slave's master has a very kind nature, and has established a relationship of complicity with his slave. Not only does he

⁴⁷ Gai. *Inst.* 1.49.

⁴⁸ Thomas 1990.

⁴⁹ Pettit 1997: 22.

⁵⁰ Gai. *Inst.* 1.52.

⁵¹ For a subtle analysis of the relation between slaves and masters as represented in Plautus' comedies see McCarthy 2004.

not interfere with the slave's plans, but he often helps him to achieve the desired aim (in the vast majority of cases, a woman's love). This master's slave, although he does not suffer his master's interferences, is still under his domination. He is able to enjoy *de facto* liberty only to the extent that his master fails to exercise his interference, either out of his kind nature or his inability to control his slave, or even his dependence on the slave to achieve his own goal. Thus, although they may enjoy a condition of non-interference, *servi* are always in someone else's *potestate* and thereby consistently suffer domination, since they are constantly in a condition which grants someone else the capacity to interfere arbitrarily in their affairs.⁵²

With regard to the status of *familia*, the *filiusfamilias* held a legal position not dissimilar to that of a slave: 'in like manner [i.e. like the slaves], our children whom we have begotten in lawful marriage are under our control. This right is peculiar to Roman citizens, for there are hardly any other men who have such authority over their children as we have . . .'⁵³ Nevertheless, although *prima facie* adult sons *in potestate* were subjected to a paternal authority not dissimilar to that exercised by masters over slaves, there were some important differences. Not only was the *paterfamilias*' authority tempered by social code and conventions,⁵⁴ but also, and more importantly from a conceptual point of view, his power could not be equally exercised over all fields of the adult son's activity. On the one hand, the son's servile condition was manifested in relation to property. The *filiusfamilias* was, in fact, capable of obligations but not of rights; he would be able to accumulate debt but not act as a creditor for himself (he could do so only in his father's interests). Although he had the right to *commercium* and could take by *mancipatio*, the property he gained never belonged to him, but always to his father. Only by his father's permission could he manage a property, which was called *peculium*, the same name that designated the property a slave was allowed to administer by permission of his *dominus*. In terms of family relations, he always owed obedience, and could not exercise command, except as an expression of his father's will. He had the legal capacity to make a military testament and could act as witness; however, he could not benefit from a will as legatee or heir, since any legacy or succession was vested in his father. He also had the right to

⁵² On the difference between liberty as non-*dominatio* and liberty from interference, see Pettit 1997: 23.

⁵³ Gai. *Inst.* 1.55.

⁵⁴ See Roller 2001: 237–9. on the role of the *consilium* to assist the father in his judgment, and the general reluctance to exercise physical punishment on adult sons, since this would have put them on a level with slaves.

conubium – that is the right to contract civil marriage and have children, whose status would be that of Roman citizens – but the *patria potestas* over them and the marital power over his wife (if the marriage was *cum manu*) were vested not in him but in his father, if still alive.⁵⁵ On the other hand, however, the *filiusfamilias* could act as a praetor or judge in a suit where his father was a party. As is attested by a provision of the Twelve Tables, the *filiusfamilias* could be emancipated and become a *paterfamilias* himself before the actual death of his father. To some extent, the fact that he could preside over the proceeding of his own emancipation renders the issue of the *filiusfamilias'* suspension of political functions while *in mancipio* less critical. If, in fact, in respect of his purchaser, the bondsman was assimilated to a slave, in respect to the rest of the world, he was *liber* and *civis* – although his political capacities were probably suspended for the duration of his bondage.⁵⁶

Most importantly, the *filiusfamilias*, although in his father's *potestas*, was not only fully entitled to all the rights of a Roman citizen, but, effectively free, could also act in the public sphere: 'the right of paternal control does not apply to the duties of public office (*quod ad ius publicum attinet non sequitur ius potestatis*)'⁵⁷ and 'a *filiusfamilias* is deemed independent in his public relations, for instance, as magistrate or as guardian'.⁵⁸

Thus, the *filiusfamilias*, who was inescapably under the power of his father in many aspects of his private life, was his own master in relation to those functions concerning the life of the community (*ius publicum*), which included all the affairs of the Roman commonwealth, from sacred ceremonies to the duties of priests and magistrates as well as the formulation of *leges*.⁵⁹

The nature of the *ius publicum*, which required those who acted within its sphere to assume responsibility for the well-being of the *res publica*, did not allow women to participate directly in Roman political life. Women married *in manu*, who thereby became subject to their husband's power,

⁵⁵ Gai. *Inst.* 2.87 and 3.163 (on the issue of legacy) and *Dig.* 44.7.39 (on the issue of debts).

⁵⁶ Gai. *Inst.* 1.16 on the condition of the *in mancipio*. *Dig.* 1.7.3: *si consul vel praeses filiusfamilias sit, posse eum apud semet ipsum vel emancipari vel in adoptionem dari constat*. Cf. Cic. *Caec.* 98.

⁵⁷ *Dig.* 36.1.14. ⁵⁸ *Dig.* 1.6.9.

⁵⁹ According to the influential definition by Ulpian, *ius publicum* 'concerns the affairs of the Roman state, and private law the interests of the individual' (*publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*) (*Dig.* 1.1.1.2). He continues 'for there are some things which are useful to the public, and others which are of benefit to private persons. Public law (*ius publicum*) has reference to sacred ceremonies, and to the duties of priests and magistrates. Private law (*ius privatum*) is threefold in its nature, for it is derived either from natural precepts, from those of nations, or from those of the civil law.' During the Republic, *ius publicum* designated the essential rules for living in common: Cicero (*Dom.* 32–3), in distinguishing between the *ius religionis* and the *ius rei publicae*, glosses the latter as *ius publicum*, which he then defines by apposition as 'the *leges*, the statutes used by this community of citizens'. See also Kaser 1986, Cloud 1992 and Ando 2006.

and those who were in bondage are described as being of a servile condition (*loco servorum*), and therefore grouped together under the heading of those *subjecti alieno iuri*. They were, in other words, under somebody else's *dominium*, and thereby unfree.⁶⁰ However, even when *sui iuris*, free Roman women born in a citizen family held neither legal power over other free citizens, nor the capacity held by their male counterparts to act or speak on behalf of others. On the one hand, they could own property, marry and divorce, and to a certain extent have recourse to the courts for justice, but on the other, they could not adopt children or administer their legal and financial dealings in a wholly independent manner due to their subjection to a guardian. Their legal inability to act in the name of the welfare of others prevented them from becoming members of a jury, since they could not pass judgment on other people, and they were also excluded from the *comitia*, because of their legal inability to decide on proposals regarding the welfare of the community as a whole.⁶¹ Thus, in regards to the *ius publicum*, women were not able to engage directly in active political life, while the *filiusfamilias*, despite his status of subjection to the *potestas* of his father, was a *liber civis* able to act politically on his own terms.

Although it has been claimed that Pettit's and Skinner's interpretation of Republican *libertas* as a basis for a modern emancipatory project is historically inaccurate, since, as their critics underline, at Rome *filiifamilias* and often women were legally under the *potestas* of someone else, as far as political liberty is concerned – namely the kind of liberty at the centre of the concern of Pettit and Skinner – all those considered at Rome to be endowed with political capability, even when *in potestate* of someone else (such as the *filiifamilias*), were said to be free with regard to the *ius publicum*.⁶²

Although for the first time the *ius personarum* appears in systematised form in Gaius' *Institutiones*, dated to the second half of the second century AD, in the late Republic the detailed capacities of the individual with regard to his status were already conceptualised according to very similar legal categories.⁶³

⁶⁰ For those *in mancipio* see *Dig.* 4.5.3. Also in Gaius 'to be *in mancipio* is equivalent to be in the position of a slave' (*mancipati mancipataeque servorum loco constituntur*).

⁶¹ Gardner 1993: 88; extended discussion of the basis of limiting women's roles and legal capacity, 94–109. See also Connolly 2007: 33.

⁶² For a robust critique of Pettit's and Skinner's analysis of Republican liberty along these lines see most recently Ando 2010 and 2011: 81–114. See also Coleman 2005 and Maddox 2002.

⁶³ Deming 2001: 218–30 identifies the first evidence of the theory of *alienum ius* in Paul's Letter to the Romans (7.1). This is based on the notion that an aspiration to the codification of the law and its principles themselves must have been already in place well before Gaius' time.

In fact, we are told by Cicero that in the process of systematising the *ius civile*, Q. Mucius provided a series of definitions which, formulated according to the method of the philosophers, shows that the principles of organisation in Gaius' *Institutiones* and other juridical texts of the Empire were already at work in the conceptual world of the late Republic.⁶⁴ It will be sufficient to mention two important definitions in Cicero's *Topica*, a work composed in 44 BC: the first, previously mentioned, articulates the distinction between those who are legally freed and slave according to the exact same categories as those found in Gaius: 'if someone has not been freed by either having his name entered in the census-roll or by being touched with the rod or by a provision in a will, then he is not free. None of these applies to the individual in question. Therefore he is not free.'⁶⁵ The second shows how the distinction between free and slave was articulated in the definition of the *gentiles*: 'people who have the same name . . . who are offspring of freeborn citizens . . . none of whose ancestors has ever been a slave . . . who have not undergone a reduction of status (*qui capite non sunt diminuti*).'⁶⁶ Formulating his definition of *gentiles*, Mucius explicitly refers to an abstract conceptualisation of the *status personarum*, which clearly distinguishes between the categories of free and slaves as legal entities, and, as the reference to the *capitis deminutio* alludes, implicitly elaborates their juridical features.⁶⁷

Although it is not certain that during the Republic the legal capacities of individuals were conceived around the three statuses of *libertas*, *civitas* and *familia*,⁶⁸ cases of *capitis deminutio* were discussed, for example, by Cicero in his defence of Caecina and of the woman from Arretium.⁶⁹ Referring to cases of *capitis deminutio media* (when citizenship was forfeited but freedom retained) and *capitis deminutio maxima* (when citizenship and freedom were forfeited at the same time), Cicero emphasises the role played by personal consent. Roman citizens who decide to enrol as citizens of Latin colonies, he claims, and those who, having been condemned by law, choose

⁶⁴ According to Cicero (*Brut.* 152–3), the organisational task of structuring the corpus of civil law required the art of logic (*dialectica*) that only Servius Sulpicius, Mucius' much younger contemporary, could fully master. Behrends 1976 takes the passage in Cic. *Brut.* 187–90 to mean that Servius had actually written a technical textbook which displayed such an *ars*. See also Bona 1980: 353–4 and Reinhardt 2003: 62–3. On the debate as to whether Cicero is referring to a method already widely in use amongst jurists or is suggesting that they follow Mucius' example see Wieacker 1988: 1618ff.

⁶⁵ Cic. *Top.* 10. ⁶⁶ Cic. *Top.* 29.

⁶⁷ On the *capitis deminutio* Buckland 1908, Momigliano 1951: 147, Kaser 1971–5: 1 271ff. and Watson 1967: 100–1.

⁶⁸ *Dig.* 4.5.11.

⁶⁹ *Gai. Inst.* 1.160–2. On the case of the woman from Arretium see, most recently, Harries 2006: 143–4.

to go into exile in order to avoid their penalty, opt by their own will to abandon Roman citizenship, but retain their status of liberty.⁷⁰ They are, in other words, subjected to a *capitis deminutio media*, which allows them to preserve their *libertas*, while voluntarily abdicating Roman citizenship. Equal emphasis on personal choice is placed by Cicero in discussing cases of *capitis deminutio maxima*: 'The commonwealth, by selling a man who has evaded military service, does not take away his freedom but decrees that one who has refused to face danger for his freedom's sake is not a free man. By selling a man who has evaded the census, the commonwealth decrees that, whereas those who have been slaves in the normal way gain their freedom by being included in the census, one who has refused to be included in it although free, has of his own accord repudiated his freedom.'⁷¹

These attestations show that late Republican politicians, who in many cases were also juridical experts, not only were well aware of these forms of juridical categorisations, but also that they could conceive of liberty as a status distinct from that of citizenship – those who went into voluntary exile, Latin colonists, and also the Augustan *Latini Juniani*, and *liberti dediticii* all being cases in point.⁷²

However, if liberty was the precondition of citizenship, citizenship was its guarantee.⁷³ As Cicero claims in his defence of Caecina, 'we have inherited the same tradition with regard to both [liberty and citizenship], and if once it is possible to take away citizenship it is impossible to preserve liberty. For how can a man be free by the right of the Quirites if he is not among the number of Roman citizens (*nam et eodem modo de utraque re traditum nobis est et si semel civitas adimi potest, retineri libertas non potest. Qui enim potest iure Quiritium liber esse is qui in numero Quiritium non est*)?'⁷⁴ In other words, *libertas* according to the *ius Quiritium* is the liberty of the citizens, that is liberty in respect of private and public law alike, whilst the liberty of non-Romans, which the Romans no doubt recognised, was from their perspective only applicable to private law. As Brunt has rightly stated, it was *political* liberty that in Rome was equated

⁷⁰ Cic. *Caec.* 98–100. On the *pro Caecina* and the juridical issues connected see Frier 1985 and Maselli 2006: 203–4. On dual citizenship cf. Cic. *Balb.* 28 and *Dom.* 77–8.

⁷¹ Cic. *Caec.* 99, cf. Gai. *Inst.* 1.162. The most extreme case of *capitis deminutio maxima* cited by Cicero (*Balb.* 28) is the instance of a prisoner of war, who, when captured, suffered a loss of all civil rights and ceased to be a citizen. However, on recovery of his liberty, he regained his former rights and citizenship *iure postliminii*, 'by right of subsequent return'. On *postliminium* see Watson 1967: 237–55. Cf. Cic. *De or.* 1.181 on Gaius Mancinus and his disputed entitlement to *postliminium*.

⁷² See Levy 1961: 144–6. and 168, Balestri Fumagalli 1987 and Roller 2001: 232 n.33. See also Gai. *Inst.* 1.12.

⁷³ Levy 1961: 142–4. See also Volterra 1956 (= 1991).

⁷⁴ Cic. *Caec.* 96. On *libertas* and *civitas* cf. also Cic. *Balb.* 24, *Red. Sen.* 2 and *Sest.* 1 and Livy 45.15.4.

to *civitas*. Ultimately, therefore, Wirszubski was right in claiming that only 'a Roman citizen enjoyed all the rights, personal and political, that constitute *libertas*'.⁷⁵

Therefore, as far as political liberty is concerned, namely the liberty of the citizen in relation to the commonwealth, it is possible to conclude from Roman juridical texts that *libertas* at Rome described a status of non-domination, which allowed the individual to conduct his life according to his own wishes, at the mercy of nobody else except himself.⁷⁶ Contrary to modern conceptions of liberty, therefore, *libertas* was defined in Rome in terms of the individual's status and not in terms of actual available choices. As it does not refer to the absence of interference or of actual constraints, this definition of liberty does not deal with the availability of choice at the individual's disposal, but rather refers to the status of the individual agent.⁷⁷ However, the word *status*, which denotes the legal position of the individual characterised by a system of juridical relations, the existence of which guarantees the individual's security,⁷⁸ is never applied in legal texts to designate the condition of slaves, who were deprived of all rights. Slaves were regarded as nothing, non-existent (*pro nullis habentur*), and this notion was articulated in expressions which denied the slaves the possession of any *persona*, *caput* or *status*.⁷⁹ Their standing is consistently described as *condicio servilis*. *Conditio* usually indicates an unstable or transitory condition, characterised by the absence of those juridical guarantees of free men, exposing the slave to the arbitrary interference of his master, who was thereby in a position to act as he wished and with impunity. This condition did not necessarily imply an interference detrimental to the interest of the slave (and ultimately manumission was a potential consequence of this interference), but denoted the slave's absolute dependence on his master's will.⁸⁰

In Pettit's now well-known definition, *libertas* in Rome was understood as a status of non-domination, that is a status where one was free *qua* living in a condition devoid not of actual interference, but rather of the possibility of interference.⁸¹ The individual could never be free when in a state of domination, however kind his master might be, and however inclined to please all his subject's wishes: it would always be the master's prerogative to

⁷⁵ Brunt 1988: 296 and Wirszubski 1950: 3–4. ⁷⁶ Skinner 2010.

⁷⁷ Skinner 2006: 156–70 and Pettit 2007. ⁷⁸ See Kaser 1971: 64.

⁷⁹ *Nov. Theod.* 17.2: *servos quasi nec personam habentes*; *Just. Inst.* 1.16.4: *servus manumissus capite non minuitur quia nullum caput habet*. See Poste 1904: 38.

⁸⁰ Melillo 2006: 20 and most recently on the topic Corbino, Humbert and Negri 2010.

⁸¹ On this whole issue see most recently Laborde and Maynor 2008 including contributions by Pettit and Skinner.

revoke unilaterally any concession that he might have granted, leaving the individual unable to conduct his life as he wished, and always inevitably at the mercy of somebody else.

This shared understanding of *libertas* in the Roman Republic found its clearest symbolic expression in two emblems: first, in the public building, the *Atrium Libertatis*, where the most important operations defining the condition of Roman citizenship were performed, and second, in the almost ubiquitous *pilleus*, the hat worn by newly freed slaves.

Within the visual context of the late Roman Republic, the triumphal pictorial art of the temple of *Libertas*, the image of its cult statue, the depiction of this deity on coins and the grand *Atrium Libertatis* in a very prominent location in the city all symbolically expressed and manifested the meaning of *libertas* as a widely held social value. In the first instance, these all embodied the notion of the status of *libertas* as opposed to that of slavery.

Scholars of the semantic system of late Republican art have sometimes interpreted these buildings and symbols as the autonomous expression of plebeian, or more precisely, anti-elite politics and culture.⁸² However, it is misleading to assign a plebeian value or anti-elite meaning to any monument or literary evidence which makes an explicit reference to *libertas*. As we shall see, these phenomena are more plausibly seen as manifestations of a shared understanding of the importance of *libertas*. This is not to say that through its control over the erection of these buildings and the choice of figurative symbols the ruling elite gave expression to a shared ideology, as Gramsci might have put it. It is rather to claim that, by controlling these means of communication, the Roman nobility constructed a meaningful symbolic framework, which even if motivated by a desire for domination gave rise to a common language setting out the central terms in which different groups in the late Republic interacted both socially and politically.⁸³ Plebeian, anti-elite, culture was not necessarily always a repository of authentic and egalitarian traditional values, just as the Roman *nobilitas* was not necessarily a machine that consistently attempted to manufacture consent.⁸⁴ Regardless of its intentions, the ruling elite did not

⁸² For a traditional interpretation of Roman art as an expression of plebeian and anti-plebeian sentiments see Bianchi Bandinelli 1970: 51–79.

⁸³ On this issue see Roseberry 1994. Holliday 2002: 13–14 emphasises that these representations served, in the first place, the need of the governing elite by commemorating their achievements.

⁸⁴ Such a view of plebeian as well as *popularis* culture is the limitation of Wiseman's otherwise splendid work *Remembering the Roman People* (Wiseman 2009). The success of the pre-Gracchan ruling elite in creating and propagating consensus is emphasised by Hölkeskamp 2010.

always succeed in establishing consent; however, it prescribed the linguistic forms in which both acceptance and discontent could be expressed. What it did establish, that is, was a common discursive framework, a common language or way of talking about social and political relationships, within which sentiments adverse to the governing nobility were manifested and expressed, as well as shaped and constrained.⁸⁵

According to this reading, the different conceptions of *libertas* in Rome in the first century BC were all elaborated within a common discursive framework, which, although developed by the nobility, gave rise to a shared meaning of liberty, and found its expression in these symbolic objectifications. Contrary to a view frequently held, it is therefore misleading to assign a plebeian (in the sense of 'anti-establishment' or 'anti-elite') value to any monument or literary evidence which makes an explicit reference to *libertas*.

However, in their symbolic elaboration of this common discursive framework, whether by buildings or coins, the ruling elite did not simply give expression to a pre-given meaning of *libertas* held within society. They erected monuments *in sensu lato* which propagated and reinforced this meaning, whilst allowing for the transformation or reshaping of certain aspects of the socio-political relationships that they symbolised.⁸⁶ As Holliday puts it, these cultural creations, alongside their function as active ingredients of the social matrix, 'expressed and constituted ideology'.⁸⁷ Such manifestations of the idea of *libertas*, which punctuated the space of the city of Rome and the physical dimension of its citizens' lives, expressed a common code of behaviour and articulated a system of normative values which defined what was acceptable within society and bound the community together.⁸⁸

The most powerful and almost ubiquitous symbol of liberty was the *pilleus*, which, functioning in a way that was equivalent to literary *topoi*, shaped and propagated the notion of *libertas* as a status opposed to that of slavery, and potentially enabled its reinterpretation. The hat worn by the freed slaves, the *pilleus* in its primary meaning served as a sign of emancipation and release from dependency, whilst still acting as a visible

⁸⁵ Within this framework could be interpreted, for example, the temple of Liber, Libera and Ceres and the statue of Marsyas which stood in the Forum through to the late Republican period. On Liber see Bruhl 1953: 30–45, Wiseman 2008 and Purcell 1993: 142–5; on Ceres see Spaeth 1996: esp. 82–6 and more in general on the temple see Cogitore 2011: 177; on Marsyas, Small 1982. For a different interpretation of the statue of Marsyas in the Forum see Coarelli 1983–5: II 87–123.

⁸⁶ Tanner 2000, Hölscher 2004 (and preface to the volume by Elsner) and Stewart 1993.

⁸⁷ Holliday 2002: xxiii and xxv. ⁸⁸ Holliday 2002: xxi.

reminder of past slavery.⁸⁹ However, as is attested most explicitly in the coins of the second century BC, the *pilleus* also came to assume a wider significance as a symbol of liberty to be applied to all members of the community, either freed or free by birth, who were symbolically associated together as living in a condition of non-slavery.⁹⁰

As attested in our literary sources, the *pilleus* was a conventionalised sign, readily recognisable, which was widely accepted as a visual metaphor of *libertas* and which acted ('performed') with this metaphorical sense within Roman society.⁹¹ When in 201 BC Q. Terentius Culleo took part in the triumphal procession of Scipio Africanus' victory over the Carthaginians, despite not being of servile condition, he wore the *pilleus*. As Livy reports, he had been captured by the Carthaginians and rescued by Scipio Africanus along with other prisoners. In order to commemorate the event and show perpetual gratitude for the restoration of his status, Q. Terentius Culleo decided to wear a *pilleus* during Africanus' triumph, and each time he thought it appropriate to honour him as the *auctor libertatis*, the restorer of his liberty.⁹² In the eyes of the whole Roman people the gesture of wearing the *pilleus* made the message of gratitude that Q. Terentius Culleo wished to convey immediately intelligible. 'He very properly made acknowledgment before the Roman people of the benefaction he received to the author of his freedom, as though to a former master (*auctori enim libertatis suae tamquam patrono accepti beneficii confessionem*)', reports Valerius Maximus of the episode.⁹³ The comprehension of this message was enabled by the immediacy and simplicity of the imagery represented by the *pilleus*, the meaning of which resonated within Roman culture.⁹⁴

However, if Q. Terentius Culleo's action reached a status of exemplarity, as is shown by its inclusion in Valerius Maximus' collection, an even greater effect was achieved by the people of Placentia and Cremona in 197 BC. During the celebration of C. Cornelius Cethegus' triumph over the Insubres and the Cenomani, the people of Placentia and Cremona took part in the triumphal procession wearing the *pilleus*. 'In the procession,' says Livy, 'were displayed many standards, much Gallic spoil was carried in captured carts, many noble Gauls were led before his chariot, and some say that Hamilcar, the Carthaginian general, was among them; but

⁸⁹ Mart. (11.6.4 and 14.1.2) portrays the *pilleus* as the cap that the slaves wore at the moment of liberation. The *pilleus* also played a prominent part during the Saturnalia, the festival where slaves could act as free. See Kreis-von Schaeuwen *RE* 20.2: s.v. *pilleus*, 1328–30, Bonfante 1975: 68–9 and Vollkommer 1992: 278–84. I still found useful Daremberg and Saglio 1877–1911: s.v. *pilleus*. See, most recently, Mouritsen 2011: 147.

⁹⁰ For a discussion of the coins see below 39–43.

⁹¹ Stewart 1993: 69; Holliday 2002: 204.

⁹² Livy 30.45.5 and 38.55.2.

⁹³ Val. Max. 5.2.5.

⁹⁴ Holliday 2002: xvii and 96.

what especially attracted attention was the throng of colonists of Cremona and Placentia, following his car with caps of liberty upon their heads (*pilleatorum currum sequentium*).⁹⁵ It is striking that, within the spectacle of an important triumph, where even the Carthaginian general Hamilcar may have been paraded as a trophy, what particularly attracted public attention was the multitude of the colonists of Placentia and Cremona wearing the *pilleus*. The message that it launched was the most powerful. The colonists wished to express their gratitude to the consul C. Cornelius Cethegus for having being freed by him from the peril of siege, and, for many of them, for having been rescued from their condition of slavery as prisoners in the hands of the enemy (*plerique etiam, cum capti apud hostes essent, servitute exemptos*).⁹⁵

The important metaphorical meaning of the ex-slave's cap was immediately intelligible within the set of social conventions and collective attitudes of Roman society. In defining the dichotomy between liberty and slavery, the *pilleus* designated those who wore it as non-slaves, and described their status as both devoid of someone else's *dominium*, in this case of the Gauls, and as recognised members of the Roman community. Often exhibited to show gratitude to those who had spared them from the condition of slavery, the *pilleus* also acted as a symbol of belonging.

In 167 BC, when King Prusias II of Bithynia wished to congratulate the Romans for their victory over the kings Perseus and Gentius, he received Roman envoys wearing a *pilleus*. As Polybius attests, 'In the first place – when some Roman legates had come to his court, he went to meet them with his head shorn, and wearing a white hat and a toga and shoes, exactly the costume worn at Rome by slaves recently manumitted or *liberti* as the Romans call them. "In me," he said, "you see your *libertus* who wishes to endear himself and imitate everything Roman"; a phrase,' Polybius comments with utter contempt, 'as humiliating as one can conceive.'⁹⁶ In the eyes of Polybius, the king's behaviour was unacceptable. He wore the *toga* and the *calcei*, the formal dress of a Roman citizen, shaved his head and wore the *pilleus* as customary signs of a recently acquired freedom. By these means, Prusias wished to emphasise his recently acquired status.⁹⁷ His main point was to present himself not as a slave to Rome, but rather as a member

⁹⁵ Livy 33.23.1–6. See Briscoe 1973 *ad loc.* with appendix on *pilleus*. ⁹⁶ Polyb. 30.18.

⁹⁷ Walbank 1957: 111 *ad loc.* On shaving as a sign of gained liberty see Livy 34.52.12 and Plut. *Flam.* 13.6, on Flamininus' triumph in 196 BC, at which the Achaeans freed Roman prisoners as a gift to him: 'This appears to have furnished his triumph with its most glorious feature. For these men shaved their heads and wore felt caps, as it is customary for slaves to do when they are set free, and in this habit followed the triumphal car of Titus.'

of its community. By redescribing his role in these terms, he made himself able to present Rome with his requests, such as the renewal of Roman alliance and the assignation of King Antiochus' land, now occupied by the Galatians, to him. 'The senate,' reports Livy, 'granted him all his requests, with the exception of the Galatian land, and voted that the victims and other requisites for sacrifice should be furnished at public expense to the king, just as to Roman magistrates, whether he wished to sacrifice at Rome or Praeneste.'⁹⁸ The *pilleus*, therefore, visualising the dichotomy between slavery and liberty, could be used not only to emphasise the absence of a condition of slavery, but also the membership of the community of the free.⁹⁹

The *pilleus*, so commonly present in daily life, also featured prominently in the imagery of the temple of Libertas. By representing the notion of liberty, it reinforced and propagated the shared understanding of the status of liberty, and its opposition to that of slavery, amongst contemporary viewers. Built in 246 BC on the Aventine, *ex multatitia pecunia* – with money levied from fines – the temple of Libertas was dedicated by the plebeian aedile Tiberius Sempronius Gracchus on 13th April, possibly to celebrate a triumph over the Carthaginians.¹⁰⁰ The fact that this temple was erected on the same *dies natalis* as the temple of Iuppiter Victor, which had been built by the consul Q. Fabius Maximus Rullianus in celebration of the famous victory of the battle of Sentinum in 295 BC, supports the idea that the temple on the Aventine was, in fact, dedicated to Iuppiter Libertas, rather than solely to the deity Libertas.¹⁰¹

The construction of the temple is often interpreted as a symbolic affirmation of plebeian self-awareness, and as a public statement of plebeian antagonism against the domination of the ruling elite. Certain points have been made to support this view: the temple was built on the Aventine,

⁹⁸ Livy 45.44.15, cf. App. *Mith.* 1.2. Although Reinach 1895 identifies Appian's source on the Μιθριδάτειος as Livy, more recent scholarship has underlined the numerous discrepancies between the two authors. On the issue of the sources see Mastrocinque 1999 (esp. iv and vi) and Kallet-Marx 1995. Reinach himself (1895: 544) claims that in the chapters on Bithynia Appian adopted Polybius (30.18) as his source. The point of view displayed by both authors is very Graeco-centric.

⁹⁹ López Barja de Quiroga 2007a: 40–3 emphasises the significance of the *pilleus* as the emblem of a liberty from slavery gained by fighting. It is to be noted that, perhaps for pragmatic reasons, the *pilleus* was also used to indicate a slave for whom the seller did not offer any guarantee. Cf. Gell. *NA* 6.4.3.

¹⁰⁰ See Ziolkowski 1992: 85–7. It is hard to imagine how in 246 BC, five years before its actual conclusion, the Romans could have envisaged a successful conclusion of the war against the Carthaginians.

¹⁰¹ This idea is supported by the *denarius* issued by C. Egnatius Maxsumus around 75 BC (Crawford 1974: 391/2) with a depiction of a distyle temple with Iuppiter and Libertas inside. Other scholars have advanced the hypothesis that there may have been two temples on the Aventine dedicated to Liberty, one to Iuppiter Libertas (which would find its parallel in the Greek Ζεύς Ἐλευθέριος) and the other to Libertas. See also Clark 2007: 22 and 58–9.

traditionally the plebeian hill; it was dedicated to a divine quality which gave expression to the political value often associated with citizens' rights, and it had been erected with funding levied from fines.¹⁰² This last point is often associated with the fine that Tiberius Sempronius Gracchus and his colleague Gaius Fundanius Fundulus levied on the patrician Claudia, the sister of the consul of 249 BC. According to Livy, finding herself jostled by the crowd, Claudia exclaimed: 'O that my brother were alive to command another fleet!' Since her brother had been heavily defeated in a naval engagement with the Carthaginians, she was fined for this remark.¹⁰³

However, all this (i.e. the fine imposed on a patrician woman for a deprecatory comment towards the Roman multitude, the historically plebeian location of the Aventine and the association of the temple divine quality with basic civic rights) does not demonstrate that the temple, or by extension the value of liberty to which it was dedicated, had a strictly 'plebeian' or anti-elite significance. As Wiseman points out, Livy's derogatory episode regarding Claudia may derive from the historiographical tradition adverse to the patrician Claudii, as attributed for example to the deeply anti-Claudian Valerius Antias. Equally, the association of the temple of Libertas with the Aventine does not necessarily imply antagonism against the ruling elite, especially when one considers the absence of references to the temple of Libertas in accounts of the defeat of the Gracchi, the closing stages of which took place on the Aventine.¹⁰⁴ In addition, there is no hint in our sources of any reason why Tiberius Sempronius Gracchus should have gone out of his way to make a public statement against the governing nobility by dedicating a temple in support of plebeian interests and in clear opposition to the ruling elite.

However, regardless of Tiberius' intentions in dedicating the temple and the significance it might have assumed for viewers in the third century BC, to the visitor of the last century of the Republic, living in post-Sullan Rome, the most prominent image inside the temple was that of the *pilleus*. Indeed, the cult-statue of Libertas itself may well have been adorned with a *pilleus*. Although the statue is now lost, this is suggested by the denarius issued by C. Egnatius Maxsumus around 75 BC, which presents a bust of

¹⁰² Broughton 1951: 1 216–17. The explicit connection between the erection of the temple of Libertas and the specific fines on Claudia can be found nowhere in the sources.

¹⁰³ Livy *Per.* 19; Livy 24.16.19; Gell. *NA* 10.6 and Ateius Capito *ap. ibid.*; Suet. *Tib.* 2.3 reports that Claudia was subjected to a *iudicium maiestatis apud populum*, the first to try a woman; however Val. Max. 8.1.damn.4 seems to imply that Claudia was actually tried for another charge, but ruined by her remarks.

¹⁰⁴ Wiseman 1979: 92 and n. 115 comes to the conclusion that a temple dedicated to Libertas on the Aventine never existed.



Figure 1 Denarius – Egnatius Maxsumus (75 BC) RRC 391/2.9

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Description: silver coin

(obverse) Bust of Cupid right, with bow and quiver over shoulder; behind, inscription.

Border of dots.

(reverse) Distyle temple, within two figures (figure on left holds staff in right hand); above figure on left, thunderbolt; above figure on right, *pilleus*; below inscription; on right inscription; on left control mark. Border of dots.

Cupid (with a bow and a quiver over his shoulder) and the legend MAX-SUMUS on the obverse, and a distyle temple with two figures, one of which holds a staff in his right hand, on the reverse. Above the temple's architrave and in clear correspondence with the two figures are pictured a thunderbolt and a *pilleus*, which act as direct attributes of the two divinities in the temple and contribute to their identification as Iuppiter and Libertas.¹⁰⁵ Although we cannot be completely sure that the image on the coin represents the cult-statue as it stood in the temple of Libertas, in the absence of any other evidence it is plausible to assume that the *pilleus* appeared prominently on the cult-statue of Libertas in her temple (Figure 1).¹⁰⁶

This suggestive hypothesis aside, it remains true that the *pilleus* was the first symbolic representation of liberty which a visitor encountered when entering the temple: from the end of the second century BC, its walls were adorned by a fresco, most probably still visible in the late Republic, which represented a rather curious subject-matter in which the *pilleus* featured prominently. Painted in 214 BC to celebrate the victory over the Carthaginians in the battle of Beneventum, the fresco pictured the

¹⁰⁵ Crawford 1974: 391/2. On the attribute of Libertas Martin 1987.

¹⁰⁶ Cic. *Dom.* 111 and 116. Clark 2007: 148 and 128–31.

joyful feast celebrated at Beneventum upon the soldiers' return. Livy, who may have seen the painting himself,¹⁰⁷ reports its peculiar subject matter: 'wearing a *pilleus* or a white woollen headband the *volones* [slaves enrolled to fight in the Roman army] feasted, some reclining, and some standing served and ate at the same time. This seemed to deserve the order Gracchus gave on his return to Rome for a representation of that day of festivity to be painted in the Temple of Liberty which his father with money yielded by fines, caused to be built on the Aventine and dedicated.'¹⁰⁸

As Livy tells us, in contravention of Roman customs and laws, Tiberius Gracchus had defeated the Carthaginian Hanno with a Roman army composed largely of slaves.¹⁰⁹ Although for the sake of appearances it was the norm to free recruited slaves upon enrolment, Tiberius secured from the senate the possibility 'to do whatever he thought to be for the good of the state'.¹¹⁰ He promised, on the one hand, liberty to those who brought back an enemy's head, on the other, servile punishment to those who retreated from their post. According to Livy, the vast majority of the *volones* displayed a remarkable courage, with the exception of 4,000 who, being less brave, had not dashed into the enemy's camp and now feared punishment for their lack of courage. At the soldiers' assembly Gracchus claimed that 'As far as the *volones* were concerned, he preferred to have all of them, the worthy and the unworthy, praised by himself, rather than to have anyone of them punished that day; that, with the prayer that it might be good and happy and fortunate for the state and for the men themselves, he ordered them all to be free.'¹¹¹ According to Livy's report, it was necessary, he said, 'to make them all equals by the right of freedom (*omnes iure libertatis aequassem*)',¹¹² that is to render them all Roman citizens.¹¹³ This act is very important for the significance of the fresco. Once they were all on an equal footing, they were to be treated as Roman soldiers, and as such exposed to the rewards and punishment reserved to Roman soldiers. As part of the prerogatives of military discipline, which also suspended

¹⁰⁷ This line is argued in the excellent study of this fresco by Koortbojian 2002. Caution is expressed by Feldherr 1998: 34 who, however, does not deny the possibility that Livy did make use of the painting as a source for his account; cf. Ziolkowski: 1992: 85–6 and Andreussi 1996: III 144 who both say that Augustus restored it.

¹⁰⁸ Livy 24.16.18–19.

¹⁰⁹ See also Val. Max. 7.6.1a. This was in itself neither a novelty nor an *unicum*; cf. Livy 22.11.8, 23.35.7, 24.11.3, 14.3, 18.2, 25.22.4, 27.38.8 and 28.36.14. Cf. Cic. *Balb.* 24: 'We are aware that slaves, whose legal rights, fortune, and status are of the lowest, are very often, for having deserved well of the state, publicly presented with freedom, that is, with citizenship.' Most recently the issue is discussed by Schofield 2012.

¹¹⁰ Livy 24.14.5. Cf. Isid. *Etym.* 9.38.

¹¹¹ Livy 24.16.9–10.

¹¹² Livy 24.16.11.

¹¹³ Livy 25.6.22: speaking of the *volones*' reward for service, '*operae pretium habent libertatem civitatemque*'.

the applicability of the civic right of protection against flogging (the right to *provocatio*),¹¹⁴ soldiers could be subjected to punishment of a servile nature. As in the case of the Bruttii, whom the Romans refused to treat as allies because of their defection to the Carthaginians, but who were commanded to serve Roman magistrates and perform the duties of slaves,¹¹⁵ so Gracchus could command newly enfranchised citizens to adopt servile postures, such as eating while standing, and serving during the celebratory feast. In order 'to prevent the loss of every distinction between valour and cowardice',¹¹⁶ Gracchus, in his role as general in command and according to his consular prerogatives, punished his soldiers:¹¹⁷ while they served in the military, those who had acted with cowardice would eat standing up. In other words, for the entire duration of their military service (but no longer than that) they would be forbidden to dine at the *triclinium*, a prerogative only of free citizens.¹¹⁸

The curious visual representation of the victory festivities at Beneventum provided its spectators with a depiction of what Roman liberty entailed. As was common practice in painting from the third century BC onwards,¹¹⁹ this fresco celebrated a Roman general's individual achievement. It provided him with an effective means of powerful narrative force, whose immediate clarity allowed him to control the way he and his actions were perceived in a much more precise form than generic claims to authority advanced through other means. However, within this context, the peculiar scene of newly freed and enfranchised soldiers, who, wearing the *pilleus* or the wooden headbands, feasted either standing or on couches, gave also immediate expression to the duties which accompanied the acquisition of Roman freedom (and citizenship).¹²⁰ Here the image of the *pilleus*, built on the notion of liberty as a status opposed to the condition of slavery, represented

¹¹⁴ Polyb. 6.37 with Walbank 1957–79: 1 *ad loc.*; Cic. 1 *Verr.* 5.163. On *provocatio* see Chapter 2: 50ff.

¹¹⁵ Gell. *NA* 10.3.19. ¹¹⁶ Livy 24.16.12.

¹¹⁷ Polyb. 6.12.7 on the consul's prerogative to punish his troops. See Livy 1.28 on Tullus Hostilius' punishment of deserters, with Feldherr 1998: 155–63. Livy 9.16.10: they are scourged and beheaded. See also Cin. Al. *ap.* Gell. 16.4.5, Cic. *Caec.* 99 and Festus 100L. Cf. Koortbojian's (2002: 35) different interpretation according to which Gracchus' conditions for their new liberty 'forced the soldiers to comport themselves as if that freedom had never been granted'.

¹¹⁸ Dunbabin 1991, 1996 and 1998. This is also attested in Apul. *Mer.* 4.8, when the robbers draw lots at their banquet to decide who should serve at the table, and who should eat reclining. See Roller 2006: esp. 84–5.

¹¹⁹ For triumphal paintings placed in Roman temples in the third century BC see Hölscher 1980: 352 and 1994: 53, Coarelli 1990: esp. 171–7 and Holliday 2002: 17–21.

¹²⁰ This is the sole attestation of this *lana alba*; see *RE* s.v. *lana* col. 598 for the woollen *pilleus* (Kroll). The view held by Welwei (1988: 10), according to whom the colonists of Beneventum rather than the *volones* wore the *pilleus* as a sign of their release from captivity, does not find confirmation in Livy's text and does not offer any explanation for the different behaviours of Gracchus' soldiers at the public banquet.

in the eyes of everyday visitors the requirement that the conduct of the Roman citizen must be in accordance with *virtus*.¹²¹ As Koortbojian has suggested, the depiction of Gracchus' distinction between citizens who fought with valour and those who had deserted Rome functioned as a moral *exemplum* upon which future generations should model their conduct: 'As such an exemplum, the banquet scene offered a quotidian vehicle for the representation of Roman values, as this particular historical event was employed to give both form and substance to a general sense of what the Romans understood as *virtus*.'¹²² On the basis of a common code in the context of an interpretative interaction between signifier and signified,¹²³ the viewer of the first century BC read the image of the *pilleus* and the different feasting postures of the soldiers as explicative of the notion of *libertas*, understood as a status opposed to the condition of slavery, which required an appropriate virtuous behaviour.¹²⁴

These symbolic images did not require the viewers' full understanding of what Morstein-Marx terms second-order allusions, that is references to individual acts or to the intentions that motivated the nobility in putting them up. Even the contemporary viewers of the fresco may not have been able to appreciate fully the historical references to the glorious victory of the general Tiberius Gracchus. However, by sharing in the same discursive framework, they would have understood the set of symbols, which, extrapolated from the dedicator's intentional context, had acquired a forceful meaning in the Roman society of the late Republic.¹²⁵

The ideal of *libertas* as a condition opposed to slavery was also constructed and perpetuated prominently through the medium of coinage. Since coins were often worn, especially at the edges, and in the Republic did not carry a dating reference to their issue,¹²⁶ those who handled them in everyday life may have often been unable to grasp the ideological message conferred upon them by the members of the nobility. Nevertheless, on the basis of the common assumption shared within society, the distinctive image of the *pilleus* was readily recognisable, and, pictured in the left hand of the goddess *Libertas*, framed its semantic range.¹²⁷

¹²¹ For a different interpretation see Koortbojian 2002.

¹²² Koortbojian 2002: 41.

¹²³ For the triadic system of signifier, signified and interpretant, and the essential role assigned to the latter see Mead 1956 and Jones 1996.

¹²⁴ On the issue of the viewer see Zanker 1994 and 1997, Gregory 1994: 99 and Holliday 2002: 210–19.

¹²⁵ Morstein-Marx 2004: 82–91.

¹²⁶ See Crawford 2011: 113.

¹²⁷ For an understanding of coins as *monumenta* see Meadows and Williams 2001. For their design as 'insider art', see Hölscher 1994: 146 and Holliday 2002: 208–10. Crawford 1974: 11 598–603 and 725–44 deals with the issue of the monetary magistrates and the choice of images, which seems to have rested with the *tresviri monetales* and those other magistrates occasionally responsible for minting.



Figure 2 Denarius – Cassius (126 BC) RRC 266/1.1

© Trustees of the British Museum. Description: silver coin

(obverse) Helmeted head of Roma, right; behind, mark (voting urn) and denominational mark.

Border of dots.

(reverse) *Libertas* in *quadriga* right, holding reins and rod (*vindicta*) in left hand and *pilleus* in right hand; below, inscription; in exergue, inscription. Line border.

If coins certainly acted as celebratory monuments, functioning as commemorative objects in which the nobility could make claims about itself, it was only within the context of an interpretative interaction between the signifier and the signified that these signs gained meaning, and by association with other symbols framed the semantic range of the values they represented.¹²⁸ The nobility's choice of signs was constrained by the society's shared understanding of basic values: moreover, those signs were themselves open to reinterpretation on the part of the viewer within the boundaries of community's moral framework.

The first attested coins on which *Libertas* features prominently are the *denarius* of C. Cassius, issued in 126 BC, and that of M. Porcius Laeca in 125 BC. In the first, the goddess *Libertas* is represented in a *quadriga*, holding the reins and *vindicta* in her left hand, and a *pilleus* in her right hand, with the legend 'C. CASSI' beneath. Corresponding to this image, on the obverse, are representations of the helmeted head of Rome and a voting urn (Figure 2).¹²⁹ This latter image alluded to the *lex Cassia tabellaria* introduced by L. Cassius Longinus Ravilla in 137 BC, which instituted the secret ballot at public trials for non-capital sentences.¹³⁰ The year after, in

¹²⁸ Hölscher 1982: esp. 273–4.

¹²⁹ Crawford 1974: 266/1.

¹³⁰ See Chapter 2: 56–7.



Figure 3 Denarius – Porcius Laeca (126–125 BC) RRC 270/1.2

© Trustees of the British Museum.

Description: silver coin

(obverse) Helmeted head of Roma right; behind, inscription; before, denominational mark. Border of dots.

(reverse) *Libertas* crowned by flying *Victoria*, in *quadriga*, right, holding reins and rod (*vindicta*) in left hand and *pilleus* in right hand; below, inscription; in exergue, inscription. Line border.

125 BC, the moneyer M. Porcius Laeca issued a denarius which pictured, on the obverse, the helmeted head of Roma and the legend *LAECA*, and on the reverse, the goddess *Libertas* in a *quadriga*, crowned by flying *Victoria*, holding the reins and *vindicta* in her left hand and a *pilleus* in her right hand; a legend below read ‘M. PORC’ (Figure 3). The legend, through the moneyer’s name, referred to the *leges Porciae de provocatione* of the early second century, which forbade the flogging of a Roman citizen and provided those citizens living outside Rome’s boundaries with legal protection against execution without proper trial.¹³¹

By associating the image of *Libertas* with the *pilleus*, both coin issues provided the idea of *libertas* with a more refined semantic range. To the basic idea of *libertas* as a status of non-slavery symbolised by the *pilleus*, the Cassian coin adds the notion of the secret ballot, symbolised by the voting urn; by referring to the proponent of the *leges Porciae* (whose name in the literary sources identified the law universally hailed as the ‘stronghold of Roman liberty’), the Porcian issue adds the idea of legal protection against physical abuses. Regardless of the moneyer’s original intentions,

¹³¹ See Chapter 2: 50.



Figure 4 Denarius – Brutus (43–42 BC) RRC 508/3.1
 © Trustees of the British Museum. Description: silver coin
 (obverse) Head of Brutus right, bearded; around, inscription. Border of dots.
 (reverse) *Pilleus* between daggers; below, inscription. Border of dots.

these associations redefine the semantic range of liberty and of its visual symbol of the *pilleus*, formulating the idea of *libertas* as a status of non-slavery, guaranteed at the political and civic level by the right to vote and the right to *provocatio*.

A further redefinition of the semantic range of liberty is marked in 43/2 BC by the famous coin issued by Brutus in celebration of Caesar's death.¹³² On the reverse, at the centre of the coin-field the *pilleus* features prominently between two daggers, whilst, below, the legend EID·MAR renders explicit the reference to Caesar's murder (Figure 4). The prominent role of the *pilleus*, which takes centre stage in the representation, associated paratactically to the legend, operates a metaphorical shift not of the intrinsic meaning of liberty, which is still conceived as a status of non-slavery, but rather of the dominion of which *libertas* (or lack of it) is described.¹³³

This alteration is effected by the juxtaposition of the legend and the daggers: hence the status of non-slavery guaranteed by the slaying of the tyrant, as Brutus successfully styled Caesar here, was the liberty of the commonwealth, rather than the liberty of individual citizens. Just as in the coins of 126 and 125 BC, the liberty of the individual was a status of non-slavery guaranteed, at a political and civic level, by the right to

¹³² Crawford 1974: 508/3.

¹³³ For a slightly different interpretation of the semantic range of the coin see Clark 2007: 141–7. For illuminating remarks on this coin see Roller 2001: 215. See also Chapter 3: 76.

suffragium and the right to *provocatio*, so in the coin issued by Brutus, the liberty of the commonwealth was a status of non-slavery, which required the elimination of a single individual, who could dominate (act as a *dominus* over) the whole community.

This notion of *libertas* as a condition opposed to slavery, which also, in political terms, entailed a series of political and civic rights, was reiterated and reinforced in the citizens' daily life by the prominent place occupied within the Roman political landscape by the *Atrium Libertatis*.¹³⁴ This building, situated at the north-west of the Forum in the saddle between the Capitolium and the Quirinal,¹³⁵ was of very conspicuous dimensions, including, by imperial times, two libraries, a tabularium and perhaps a basilica.¹³⁶ It was inaugurated as a *templum* and dedicated, according to Ovid, on 13th April, interestingly the same day as the temple of (Iuppiter) Libertas. Although scholars tend to cast some doubts over the reliability of Ovid's testimony, the coincidence of the dedication date between two major buildings in Rome both consecrated to Libertas suggests that, at least by the very end of the first century BC, the notion of *libertas* as expressed in the two buildings could have been perceived on a basic level as ideologically homogeneous.¹³⁷

Just as the prominence of the *pilleus* in the imagery associated with *libertas* indicated and reinforced a conceptual dichotomy between liberty of the members of the community (either freed or free by birth) and slavery, so the *Atrium Libertatis*, the headquarters of the censors, demarcated a line between the Roman citizen and 'the others', slaves and foreigners.¹³⁸ Although in practice the two groups were subjected to an almost consistent osmosis, from an ideological point of view they were conceptualised as two very distinct categories, and the passage from one to the other had to

¹³⁴ Hölkeskamp 2005: 23.

¹³⁵ Coarelli 1993: s.v. *Atrium Libertatis*. See also Castagnoli 1946. Purcell 1993 identifies it with the building conventionally known as *Tabularium*. See also Amici 1996.

¹³⁶ One side of the building corresponded to the long side of Caesar's Forum. On the dimensions of the *Atrium* see Serv. Aen. 1.726.

¹³⁷ Ziolkowski 1992: 87 n.5 and Purcell 1993: 142 n.65.

¹³⁸ It is interesting to observe that the etymology of *liberi*, although rather obscure even to the ancients themselves (Varro *Ling.* 6.2, Festus 121L), seems to designate the members of an ethnic group. Deriving from the same Indo-European root, *leudh-, which means 'to grow, develop', *liber* and its Greek equivalent ἐλεύθερος encapsulate the idea of the end result of a growth process, and as collective nouns come to designate ethnic groups, conceived as the sum of those who were born and grew up together. It was a comparatively short and plausible step from the collective noun *leudho- to the adjective *(e)leudhero-, which initially described those who belonged to the same group and were thereby endowed with the same qualities. See Benveniste 1936: 51–8 and 1973: 261–7, Ernout-Millet 1959: s.v. *liber* and Walde 1938: s.v. *liber*. Vaan 2008: s.v. *liber* associates the reading -oe- with diphthong -oi- found in Faliscan. See also Maurin 1975: 221–30, who offers a complex analysis of the Latin word pair *liber* and *puer*, their respective meanings and social significance.

be closely regulated and controlled. Thus, the *Atrium Libertatis* was not only the place where slaves, bereft of the civic right to *provocatio*, could be tortured, and foreigners kept in custody, often as hostages,¹³⁹ but also the building where the access of non-Romans and ex-slaves to Roman citizenship was administered and controlled.¹⁴⁰ As such, it was the location where *manumissio censu* took place, and in 167 BC the appropriate place for posting the lists which assigned former slaves (that is, new Roman citizens) to their voting tribes. In 168 BC, it was the scene for the controversial drawing of the lot deciding the tribe to which the newly freed slaves should be assigned.¹⁴¹

We also know that the *Atrium Libertatis* housed a tabularium, as attested by its closure in 169 BC when the censors were accused of *perduellio*, which in all likelihood contained the *tabulae publicae* recording the status of the citizens, as well as the cadastral records of *ager publicus*.¹⁴² Finally, at least by the time of Cato the Elder, in accordance with its archival function, the *Atrium Libertatis* also displayed Rome's first public collection of literary texts: the laws, the ultimate guarantors of Roman liberty.¹⁴³ In the complex monumental landscape of Rome, the *Atrium Libertatis* stood in all its grandeur as an attestation and reminder of the basic shared notion of liberty, which, in opposition to slavery, defined the identity of Roman citizens.

The next chapter investigates those rights which created, protected and guaranteed this status, which ultimately coincided with the rights of Roman citizens.

¹³⁹ On the tortures meted out to slaves in the *Atrium* see Cic. *Mil.* 59. The most commonly used location to accommodate foreigners was the *Villa Publica*: Livy 30.21.12 and 30.24.5 and Josephus *BJ* 7.5.4. On the *Atrium* as residence of hostages Livy 25.7.12.

¹⁴⁰ Cic. *Arch.* 11. ¹⁴¹ Livy 45.15.1–5. See Purcell 1993: 142–5 for the other functions of the building.

¹⁴² Livy 43.16.12–13 and Cic. *Arch.* 8. See also Crawford 1996: 1 24.144–5 (*Tabula Heracleensis*). On the cadastral record see Livy 43.16.12–13; Granius Licinianus 28.36 Criniti on the *forma agrorum* of the centuriation of the *Ager Campanus* in 165 BC. By virtue of its grandeur and secure location in the heart of the city, the *Atrium* also functioned as a meeting-place of the senate, at least in 80 BC during the construction of the *Curia Cornelia*. See Bonnefond 1979. On the *Atrium Libertatis* as residence of archives see Nicolet 1994b.

¹⁴³ Festus 277L; Cato fr. 220 (Malcovati 1955: 89) which alludes to the destruction of a law on the chastity of the Vestals in a fire, along with many other laws. On laws and liberty see Chapter 2: 62ff. C. Asinius Pollio is recorded to have first built a *bibliotheca ex manubiis* and dedicated it as a public monument, although, as Purcell rightly underlines (1993: 145), not necessarily the first at Rome or in the *Atrium Libertatis*. See Plin. *NH* 7.115 on the special place of honour reserved for M. Terentius Varro, the only living man among those celebrated. See also Suet. *Iul.* 44 and Isid. *Etym.* 6.5.1–2, which itself derives from Suetonius.

The citizens' political liberty

In the first century BC the basic notion of *libertas* was conceptually defined as a status of non-slavery. It was figuratively expressed by the *pilleus*, which reinforced and propagated *libertas* as an ideal amongst its viewers. In juridical terms, *libertas* was also socially experienced as a notion which would be enshrined in the *status personarum* of imperial legal texts, as the status of non-subjection to the arbitrary power of somebody else, either an individual or a group. It thereby described the status of an individual who was not subjected even to the possibility (as opposed to simply the actuality) of arbitrary interference.¹ It follows that the Roman definition of a free person was formulated in negative terms: it described the status of an individual who was not a slave, that is an individual who was not *in dominio* or *in potestate* of another person or group of persons – who did not, in other words, live at anyone else's mercy.²

This shared notion of liberty is also attested in the extant writings of the historians and political thinkers of the first century BC, such as Cicero, Sallust and Livy. These authors of course describe slavery itself by adopting the vocabulary appropriate to Roman legal discourse, referring to the condition of slaves as either the condition of subjection to a master (*in potestate*), or the status of prisoners of war – a condition of dependence upon the will of the enemy (*in potestate hostium*) that entailed deprivation of both liberty and Roman citizenship.³

¹ See [Chapter 1](#): 29–30. For the most recent formulation of this Republican theme see [Skinner 2010](#).

² The negative nature of the definition of ancient liberty and the identification of slavery as its antonym are emphasised by the most recent works on the topic. See, for example, [Roller 2001](#), whose study is focused on the early empire, and [Rotman 2009](#) on the transition between Roman and Byzantine periods. The description of *liber* as someone who is not a slave goes back at least to Mommsen 1887–8: III 62.

³ See, for example, on slaves as *in potestate* of their masters Livy 8.15.8, 8.20.6 and 34.36.6; on prisoners of war as *in potestate* of somebody else, and hence in a condition of actual servitude Livy 8.24.9, 22.59.2, 22.60.1, 22.60.8, 24.1.6.3, 27.21.10, 31.18.8 and 37.34.4, Sall. *Iug.* 112.3 or Cic. *Leg. Man.* 5.

However, these authors also adopt legal vocabulary to describe the status of political liberty. In describing the loss of political liberty they adopted the same negative terms as those adopted in describing the loss of juridical liberty, so that the meaning of possessing or losing one's own political liberty was analysed in terms of what it meant to fall into a condition of enslavement or servitude.⁴ Thus, Livy could state that Roman citizens should exercise their vote according to their own choice, acting as free men rather than under compulsion – that is, not in the manner of slaves; he could also claim that the conferral of a command by sole senatorial decision would have enslaved the *suffragium* of the people to the power of the few and reduced it *in potestatem paucorum*.⁵

Thus these authors recurrently use a conceptual metaphor, whereby the source domain (in the parlance of Lakoff and Johnson) is the actual experience of slavery, and the target domain is the citizens' political experience, in order to conceptualise what it means for an individual to possess or lose his political liberty.⁶ The adoption by these authors of the metaphors of 'falling into slavery' and 'loss of liberty' in the juridical aspects of slavery is not only a linguistic or rhetorical phenomenon but also, as Roller claims, a cognitive and heuristic strategy: 'Since the whole concept and structure of the master–slave relationship is projected *en bloc* into the derived political domain, then not only are a large number of individual terms and images made available for use in the political domain, but these terms and images also retain their connotations and the relations that obtain among them. Thus, if in the parent domain [or source domain, that is the domain where language is used in a literal, non-metaphorical, sense] freedom is the condition of not having a master, so too in the derived domain [or target domain, in which a different social experience is expressed and structured according to the same categories of the source domain].'⁷ However, this metaphorical structuring of liberty does not imply that, as Roller suggests,

⁴ Skinner 1998: 36. See also Pettit 1997: 22 and 31–2.

⁵ Livy 6.41.1–2 and 10.24.7f. See also Livy 22.34.1. On *suffragium* as one of the strongholds of liberty see below 54ff. Cf. also Livy 35.32.11 concerning the political liberty of Greek states: *libertas 'suis stat viribus, non ex alieno arbitrio pender'*.

⁶ The seminal text is Lakoff and Johnson 1980. Kövecses 2002 is a recent synthesis of the research paradigm. See Cooper 1986: 144–52 on the fact that not all metaphorical expressions are manifestations of systematic conceptual metaphors. See also Sjöblad 2009.

⁷ Roller 2001: 219. It seems that Roller works on the assumption of a kind of ontological precedence between domains to which the same term can appropriately be ascribed, so that the derivative domain remains a secondary one, bereft of a life of its own. Rather than the derivative domain, it would be more profitable to refer to the notion of political slavery as the target domain, and to that of juridical slavery as the source domain. See Kennedy 1993: 46–63 for a deconstructive work on the use of metaphor in ancient texts, specifically elegy.

the idea of *libertas* never had a political meaning in Rome.⁸ Structured by the categories of the social experience of slavery and expressed in the same terms as its juridical notion, this negative idea of liberty could be metaphorically configured in a variety of ways, giving rise in turn to an equal variety of meanings, all referable to the same source domain

This metaphorical structuring relationship, where a mapping (in Lakoff's terminology) is elaborated between the source domain of the actual experience of slavery and the target domain of the political dimension of power, inevitably gives rise to a political notion of liberty, which articulates the relationship between the individual citizen and the power of the commonwealth according to the shared conceptualization of slavery.⁹

Since, in Roman juridical discourse, slavery was the status of dependence on the arbitrary will of another person or groups of persons, it follows that the Romans, conceiving political liberty by means of the metaphor of slavery, conceptualised it as a status of non-subjection to the arbitrary will of another person or group of persons, and analysed its loss in terms of falling into a condition of slavery.

The ability to avoid this fall, and to preserve the status of political *libertas*, was dependent on two very important conditions: (a) the civic status of the individual Roman citizen, and (b) the constitutional arrangements of the commonwealth in which he lived and where varying levels of liberty corresponded to different sections of society. What follows is an investigation of the notion of a person's civic status, which was considered necessary but not sufficient for the establishment and preservation of political liberty.

In Rome during the Republic a person possessed political liberty in the first place by virtue of his being a *civis*.¹⁰ The status of political liberty was achieved by a matrix of rights (*iura*) that protected the individual citizen's range of choices against the imposition of an alien will, thereby allowing him to conduct his life at his own volition. As Brunt has noted, the 'Romans

⁸ Roller 2001: 232: 'it is incorrect to speak of *libertas* as being a "political idea" or as having a "political meaning" in Roman culture', since this would designate 'a coherent category of Roman political thought, independent of its function as a category of social status and its embeddedness in the institution of chattel slavery' of which he sees little evidence. A similar argument is also developed, to a lesser extent, by Connolly 2007: 158–62. See, most recently, Ando 2011: 86–7: 'its [of liberty at Rome] understandings remain nearly forever derivative from, indeed, one might say they were parasitic upon, the binarism of slave and free. It must furthermore be stressed that this polarity was not intellectually productive: in a slave-owing society of sometimes astonishing brutality, the wish that one were free rather than slave does not amount to a political-theoretical claim of great sophistication.'

⁹ Lakoff and Turner 1989: esp. 50–4, with the illuminating discussion of the metaphors 'life is a journey', 'life is a precious possession', and 'life is a bondage'. Black 1962: esp. 25–47 emphasises the active role of metaphors in the creation of new meanings.

¹⁰ See Chapter 1: 28–9.

often associated their right or rights (*ius* or *iura*) with their *libertas*, or used the terms interchangeably.¹¹

These rights constituted the institutional means by which the liberty of citizens was preserved from the domination of the ruling class, rather than from their interference. The suspension of these rights, which would have exposed Roman citizens (even at the risk of their lives) to the whim of those in power, would not necessarily have narrowed down the range of options available to them; it would, however, have put them in a condition of domination by the ruling class. In the formulation of Pettit and Skinner, domination can be defined as being subject to the arbitrary will of another person or group of persons, 'thereby leaving yourself open to the danger of being forcibly or coercively deprived by your government of your life, liberty or estates'.¹² Citizens' rights represented the legal bulwark that protected the status of liberty and allowed citizens to pursue their chosen ends. They functioned as the means through which Romans succeeded in conducting their lives unobstructed by magistrates or groups wielding political power, in the pursuit of their freely chosen goals.

By protecting the action of the individual from the exercise of arbitrary power, these *iura* allowed the individual to perform an action as a matter of right rather than grace. They guaranteed the citizens' ability to conduct their life at their own will without being subjected to others' whims or preferences; that is, they ultimately guaranteed the citizens' status of liberty.

In our sources, the rights to *suffragium*, *provocatio*, all the powers of the tribunes of the plebs (*auxilium*, *intercessio* and the *ius agendi cum plebe*), and the rule of law generally, are presented as the true foundations of Roman liberty. To be precise, they were the institutional means through which the status of political liberty was established and maintained, rather than the incarnation of liberty itself, as is often claimed.¹³

¹¹ Brunt 1988: 296. ¹² Skinner 1998: 69–70. See also Pettit 1997.

¹³ *Iura populi* is a term equivalent to *libertas* in Sall. *Cat.* 38.3; *Hist.* 1.48.11Mc, 1.48.13Mc and 1.48.23Mc. On their relation see Cic. *II Verr.* 1.7.2, 2.16, 5.143, *Rab. Perd.* 11f. and *Sest.* 30; Livy 3.56.8–10; on the protection of the citizen's person see Cic. *II Verr.* 5.163, *Cat.* 4.24, *Att.* 15.13.27; Cic. *Corn.* 1.47–50 Cr. = Asc. 76–8C; Pollio in *Fam.* 10.31.3; Livy 1.17.3, 24.21.3. Cf. Sall. *Hist.* 1.10Mc. On *suffragium* see Cic. *Leg. agr.* 2.29 (as electoral rights); Livy 37.52.5 (participation in comitial trials for political offenders); Sall. *Cat.* 37.9 (eligibility for office). On the fact that liberty rested on laws see Cic. *Cluent.* 146–55 and on the more general association of law(s) and liberty see Cic. *Mil.* 77, *Phil.* 11.36, *Off.* 2.24, 3.83; Sall. *Hist.* 1.48.4Mc, 1.67.11Mc; Livy 2.1, 4.15.3, 34.26.7, 39.27.9, 45.31.4, 45.32.5. Cato fr. 252 (Malcovati 1955: 96): '*iure, lege, libertate, re publica communiter uti oportet, Gloria atque honore, quomodo sibi quisque struxit*' (cf. Cic. *Phil.* 1.34). The tribunate was a bastion of Roman liberty, not only concerning the freedom of ordinary citizens from arbitrary oppression (Sall. *Hist.* 3.34.22Mc; Cic. *Leg.* 3.9, 3.15–25; Dion. Hal. *Rom. Quaest.* 6.87.3; Livy 2.23.2, 2.28.7, 2.33.1, 3.9.2–4, 10.13–14), but also their right to share in the control of the state: Cic. *Leg. agr.* 2.15, *Rab.*

Although the gradual introduction of these rights from (according to tradition) the very early years of Rome was perceived as the result of partisan political manoeuvring, by the first century BC they had become universally accepted as the essential means of protecting citizens from arbitrary coercion or interference. Since they provided the citizens with the necessary basis to enjoy a full life, these rights can be described as the basic Roman liberties that protected the range of choices that were deemed necessary within Roman society to guarantee its citizens the enjoyment of a free life.¹⁴ In this conceptual framework, laws functioned as the highest protection of political liberty, since, as expression of the will of the citizen body, they provided these rights with a binding force that was equally applicable to all.

In the late Republic, while the rights to *provocatio* and *suffragium* and the legal prerogatives of the tribune of the plebs were regarded as basic Roman liberties, a notable exception was the right to ownership. Although there is no doubt that the ownership of property was essential to an independent life (that is, a life not at the mercy of someone else),¹⁵ nowhere in our sources does the notion of the right to property appear explicitly cited in direct connection with the value of liberty as a definitional element of Roman citizenship.¹⁶ Certainly, during the Republic, the rights held under the *ius civile* by Roman citizens *qua* citizens included the right to own property. However, although it was part of the bundle of the positive legal rights held by the individual citizen, it did not define Roman citizenship.¹⁷ Rather than being defined by the right to property, citizenship was a precondition for the existence of that right.¹⁸ Basic Roman liberties provided the ability to enjoy the life of a free citizen by protecting certain choices from external domination. In the history of the Republic, their specification was frequently the result of the struggle for power by

Perd. 1–4, *Sest.* 30, *De or.* 2.199; *Sall. Hist.* 1.48.13Mc, 3.34.26Mc; *Diod.* 12.25.2; *Livy* 3.37.5, 3.45.8. Cf. *Polyb.* 6.16.4ff. Bleicken 1955: 106–49 is exhaustive on tribunician legislation and other activity.

¹⁴ Pettit 2008: 201–24; Pettit 2009: 48.

¹⁵ See Kloesel 1935: 42–4, Wirszubski 1950: 44–6 and Brunt 1988: 346–9 on liberty and economic independence.

¹⁶ On the Roman conceptualisation of the right to property see Garnsey 2007.

¹⁷ Garnsey 2007: 182 and 186.

¹⁸ Note that the centuriate system allowed for those who possessed nothing to be enrolled in the class of the *proletarii*, as well as the reference to Philippus' speech about those Roman citizens who owned nothing (*Cic. Off.* 2.73). These attestations refer to the fact that one could own nothing and still be a Roman citizen, but do not tell us much either way about the existence of the concept of a right to property as definitional element of citizenship. Even Cicero's *de officiis*, which presents the aim of commonwealth as the preservation of private property, does not present the right to property as one of the basic rights establishing the citizens' status of liberty.

marginalised groups, but in the first century BC they had become established as a set of basic rights which identified free Roman citizens.¹⁹

One of these was the citizens' right to *provocatio*. This protected the life and the person of a citizen against the coercive powers of Roman magistrates. The citizen in trouble made a cry for help to the people, '*provoco ad populum*', which, although in archaic Rome it may have functioned as a more generic measure employed to rally support round a threatened individual,²⁰ in the later Republic came to be regarded as a guarantee against execution without trial and, after the *lex Porcia*, against flogging.²¹

The initial phases of this right's historical development are rather confused,²² but the first undisputed evidence of this principle's legal sanction is the *lex Valeria* of 300 BC, followed by the *leges Porciae* of the second century BC. These laws established the right to appeal to the people from sentences of execution, flogging and heavy fines, increased the sanctions against the violation of *provocatio*, and also expanded its sphere of validity outside the city of Rome.²³ However, in the late Republic the *lex Semproniana*, enacted in 123 BC, came to be perceived as the true embodiment of the right to *provocatio*.²⁴ Often mentioned in the same breath as the *lex Porcia* as the true defender of Roman liberty,²⁵ this law prohibited the capital punishment of a Roman citizen for any charge without authorisation from the people (*iniussu populi*) in the form either of assembly or of a court established by law.²⁶

The right of *provocatio* as enshrined in these laws was accordingly presented as the guardian and bulwark of Roman *libertas*.²⁷ As the *plebiscitum Duillianum* asserts, all magistracies had to be subject to the right of *provocatio*; the death penalty was reserved for those who attempted to set up any

¹⁹ On the rights of free citizens see Sherwin-White 1973 and Gardner 1993. It follows that the Romans did not identify the set of basic liberties with those rights that nowadays we consider inalienable, such as the right to worship, the right to movement, *et sim.* see Schulz 1936, Momigliano 1951 and 1971, Brunt 1988, Sluiter and Rosen 2004 and Arena 2011c.

²⁰ Bleicken 1959b, Kunkel 1962: 21ff., Lintott 1972 and 1999: 33 and Cloud 1984 and 1998.

²¹ Cato fr. 117 (Malcovati 1955: 48); Cic. *Rab. Perd.* 12; Sall. *Cat.* 51.21. See Kunkel 1962 and Brunt 1988: 222–7.

²² See Livy 1.26.8ff. On the initial phases of this right see Cloud 1998. On *provocatio* see Santalucia 1998: 29–46, 52–5 and 70–5.

²³ Cic. *Rep.* 2.54, *Rab. Perd.* 12; *Corn.* 1.50 Cr. = Asc. 78.1C; Livy 10.9.4ff. For a historiographical overview see Lintott 2009.

²⁴ Cic. 11 *Verr.* 1.13ff., 5.163, 5.172ff.

²⁵ Cic. 11 *Verr.* 5.163. See also Sall. *Cat.* 51.22; Ps.-Sall. *In Cic* 5 and Crawford 1974: 301/1 (110 or 109 BC) and 270 (125 BC) of the Porcii Laecae with commentary.

²⁶ Cic. *Cat.* 4.10, *Sest.* 61; Dio 37.14.5; *Dig.* 1.2.2. See also Cic. *Rep.* 2.53, *Leg.* 3.6; Livy 2.29.10, 4.13.11.

²⁷ Cic. *Dom.* 33, 43, 47, 77, *Leg.* 1.42; Asc. 41.13fC.; Livy 3.13.4, 3.45.8, 3.55.4, 3.56.5–6, 3.56.10–13; cf. 3.53.4–6; Cic. *De or.* 2.199, *Rep.* 3.44.

magistracy that would be exempted from this right, since such an action was tantamount to the establishment of tyranny.²⁸ With Verres' infringement of this right, Cicero claims, it was liberty itself that had been violated. The Romans' 'rights, interests, protection, and indeed entire liberty' therefore depended on his condemnation.²⁹

Our extant sources for the late Republic do not report the existence of an authentic instance of trial on appeal by the people, with the exception of the archaic proceeding resurrected in the case against Rabirius. This fact, which is rather peculiar given the emphasis on the central role of the *ius provocationis* in the sources, has led scholars to postulate that this right was regularly infringed.³⁰ However, the function of the right was to guarantee citizens the possibility of conducting their lives free from the arbitrary exercise of magistrates' coercive powers, but in a manner nevertheless in full accordance with the laws. In other words, the right to *provocatio* was not applied in cases where a citizen was subjected to a fair trial or was in the wrong, because its purpose was to deter those in power from arbitrarily punishing Roman citizens.³¹

However, the right to *provocatio* was not in itself sufficient to guarantee a status of non-dependence on the arbitrary power of magistrates. Citizens who thought themselves to have been wronged could also avail themselves of the right of *appellatio* to a tribune. The tribune, protected by his sacrosanctity, which allowed him to interpose his own person to obstruct the actions of magistrates, was entitled to succour any citizen who appealed to him. By virtue of this right, citizens could not be denied access to the tribunes, who were stationed in easy reach by the Basilica Porcia (near the *comitium* and the *curia*), were prescribed by legislation not to be absent from Rome for a whole day, and were not even allowed to shut the door of their house in day- or night-time for the entire duration of their office.³² Ultimately, however, this right rested on the tribunes' decision whether to intercede in support of the appellant, so as to benefit the latter by exercise of their *auxilium*. A tribune could deem it inappropriate to intervene in the citizen's favour.³³ As Wirszubski rightly underlines, '*auxilium* was an institution of which the citizen could avail himself, but it was by no means his indefeasible right as was *provocatio*. The citizen's right was *appellatio*, whereas *auxilium* was the tribune's right.'³⁴

²⁸ Livy 3.55.14. ²⁹ Cic. II *Verr.* 5.172–3; cf. 1.13f., 5.163.

³⁰ For the case of Rabirius, see Chapter 4: 205–8.

³¹ Brunt 1988: 333. ³² Lintott 1999: 124.

³³ See Livy 3.56.5, 9.34.26; Val. Max. 4.1.8; Plin. *HN* 21.3.8f. for instances of *auxilium* refused.

³⁴ Wirszubski 1950: 27. McGlew 1986: esp. 429ff. ascribes the assigned centrality of *provocatio* to Mommsen's modern reading.

However, given the overall conception of the tribunes of the plebs as champions of the people,³⁵ the *ius auxilii*, with its closely connected *appellatio*, was perceived as providing an effective guarantee of the citizen's civic rights against the abuses, or alleged abuses, of those who held *imperium*. The tribunes' *auxilium*, which was an expression of their power of *intercessio* against other office-holders of *par maiorve potestas*, meant that the tribunes were the magistrates most suited to acting in defence of citizens against offences by other officials. Indeed, since their office was according to tradition created for the purpose of *auxilium*, the tribunes of the plebs enjoyed the standing of *maior potestas* in relation to all other magistrates including the consuls (but excepting a dictator).³⁶

This function of protecting against the arbitrary will of those in a position of power is at the root of the Roman understanding of *auxilium* as the guardian and bastion of liberty. Since these rights were an essential part of the matrix which constituted the citizens' status of *libertas*, it is not surprising that even members of the elite appealed to them when they felt isolated and in danger. As an essential part of the conceptual and juridical notion of *libertas*, these rights were not even abolished by Sulla in his radical institutional reforms of the commonwealth. Despite drastically curtailing the tribunes' powers and depriving them of numerous rights, he did not remove the *ius auxilii* from their remit. Any political reform that deprived the people of the right to appeal against perceived abuses would have legally consigned Roman citizens to domination by those in power. By formally establishing an oligarchy, this would have enacted what could have been legitimately described as Roman citizens' reduction into a state of servitude – which was certainly never part of Sulla's political project.³⁷

As the repository of the *ius auxilii* and *intercessio*, the tribunate of the plebs, almost by metonymy, was regarded and described as *praesidium libertatis*, the true defender of Roman liberty.³⁸ The tribunes not only preserved

³⁵ See Polyb. 6.16.4.

³⁶ See Cic. *Leg.* 3.9 and Livy 3.9.2 on the connection between the tribunate and the right of *auxilium* at the origins of the magistracy. On the overriding power of the tribunes see Cic. *Rep.* 2.58, *Leg.* 3.16; App. *B Civ.* 1.1. Cf. Livy 2.33.1, 2.54.5, 4.26.10.

³⁷ Livy 3.45.8: *duae arces libertatis tuendae*. Cf. Livy 3.53.4; Lintott 1999: 202. If the ideological and juridical structure I am building is not erroneous, there is no need to see the recourse to *auxilium* on the part of members of the elite as a sign of perversion of the whole system, as Lintott seems to suggest, but actually as an essential juridical guarantee of the liberty of the individual. On Sulla and the *ius auxilii* see Brunt 1988: 332, who underlines that Sulla may have, however, deprived the tribunes of the right to bring charges before the people in assembly. On the aims of Sulla's reforming programme see most recently Flower 2010: 117–35.

³⁸ Cic. *Leg. agr.* 2.15, *Rab. Perd.* 1–4, *Sest.* 30; II *Verr.* 5.63.163, *De or.* 2.199; Sall. *Hist.* 1.48.13Mc, 3.34.26Mc; Diod. 12.25.2; Livy 3.37.5, 3.45.8. Cf. Polyb. 6.16.4f.

the lives of the citizens and their person from unlawful imprisonment, beating or whipping; perceived by Romans as one of the institutional means which guaranteed the liberty of citizens, they were described as *vindices omnis iuris* and the bastion of Roman liberty.³⁹ The tribunes of the plebs fulfilled this function in two ways: first, by holding the *ius auxilii* and the power of *intercessio*, they secured the protection of the life and person of Roman citizens; second, by holding the right to initiate legislation, which was conceived as the expression of the people's wishes, they functioned to guarantee Roman citizens the actual enjoyment of their liberty, providing the institutional means by which they could conduct their lives on their own terms.⁴⁰ As reported by Polybius, in exercising their veto against the political motions of all other magistrates (albeit with the exception of the dictator), and even against the decrees of the senate, the tribunes were expected 'to aim at doing what the people wished'.⁴¹

The *ius agendi cum plebe* was perceived as an important constitutive trait of the magistracy's role. Writing in the second half of the first century BC, Sallust makes Licinius Macer dismiss the idea that personal rights, such as the *ius auxilii*, were sufficient on their own to guarantee the people's freedom. According to Licinius Macer, the tribunate that he held, being bereft of the right to initiate legislation, was an 'empty shell of magistracy'.⁴² In order to repel the domination of the nobility and establish a state of *libertas*, it was essential for the tribunes to regain the powers of unrestricted *intercessio* and *ius agendi* of which Sulla had deprived them. Along similar lines, Aemilius Lepidus, in Sallust's account, is made to fight for the restoration of tribunician powers in order to overthrow *servitium*.⁴³ In fact, the *ius agendi cum plebe* of the tribunate of the plebs was perceived to be such an important constitutive trait of this magistracy that even Cicero – certainly not a subversive politician – regarded it as necessary to the proper functioning of the *res publica*. In Cicero's opinion, the tribunate

³⁹ Cic. *Leg.* 3.9, 3.15–25; Sall. *Hist.* 3.34.26Mc; Dion. Hal. *Rom. Quaest.* 6.87.3; Livy 2.23.2, 2.28.7, 2.33.1, 3.9.2–4, 3.10.13–14.

⁴⁰ Sall. *Hist.* 3.34.22; *Jug.* 31.16ff.: liberty is guaranteed by the exercise of the right to vote on the legislative proposals put forward by the tribunes. See also Sall. *Hist.* 1.67.14Mc; Cic. *Leg.* 3.19–22; Flor. 2.1.1. Cf. Cic. *Rep.* 2.59. On the power of the tribunate to present legislation as expression of liberty see Ferrary 1982: 757, *contra* Wirszubski 1950: 50–2 and Roller 2001: 229. See below Chapter 3: 140–1.

⁴¹ Polyb. 6.16.5. Cf. Plut. *Ti. Gracch.* 14.5. See below Chapter 3: 92, 102ff. On Polybius' insertion of this passage see Walbank 1957–79: 1 *ad loc.*

⁴² Sall. *Hist.* 3.34.3Mc. Cf. Vell. Pat. 2.30.4: tribunate as 'shadow without substance'. Cf. Livy 6.37.4: the omission of *imperium* from the tribunes' powers seriously hindered, in the tribunes' opinion, their ability to act as magistrates.

⁴³ Sall. *Hist.* 1.48.1Mc.

had to be accepted and praised, despite its dangerous potential, because it provided the citizens with the measure of freedom necessary to the proper working of the *res publica*.⁴⁴ From a pragmatic point of view, he claims, the tribunate could act as a constraint upon disruptive popular forces; and from a theoretical point of view would provide the people with the necessary measure of true liberty. However, the senate retained the means to curtail the force of the tribunate, whilst the latter enabled the exercise of those rights in which the citizens' liberty resided. As stated in the *de republica*, the tribunate was necessary in principle for the liberty of the citizens and for the stability of the mixed and balanced constitution. Even if there were alternative and competing views about the nature and extension of the tribunate's power, the importance and the very existence of the magistracy were not in question.

As Brunt summarises, 'The legal rights that Romans most explicitly and commonly subsumed under the title of freedom are of two types: immunity from arbitrary coercion and punishment by magistrates, and some degree of participation in political power.'⁴⁵ The degree to which popular participation in political power could be exercised was subject to debate and, at times, fierce struggle; but no one ever denied that some share in political power, however limited, should be maintained as an essential means to guarantee the citizens' *libertas*.

Just as the tribunes of the plebs, endowed with the *ius agendi cum plebe*, were theoretically conceived as presenting those measures which mirrored the people's wishes, so the citizens had the right to *suffragium*, which provided them with the opportunity to enact or reject those proposals. Taken together, they constitute the Roman version of the conceptual notion of a self-regulating community.

It comes as no surprise that the citizens' *ius suffragii*, exercised in electoral and legislative assemblies as well as in comitial trials, was praised as a guarantee of liberty or even as its equivalent.⁴⁶

Projecting late Republican political conceptions on to the distant past, both Livy and Dionysius of Halicarnassus describe the right to vote, both in legislative and electoral settings, as the popular bastion of Roman liberty. According to Dionysius, for example, by depriving the people of the power to enact legislation, Tarquinius Superbus was responsible for the

⁴⁴ Cic. *Rep.* 2.45ff. Cf. Cic. *Leg.* 3.9 (?), 16–17 and 19b–26. See also Dyck 2004: comm. *ad loc.*; Ferrary 1982: 785.

⁴⁵ Brunt 1988: 297.

⁴⁶ On this point see the sources cited at p. 48 n. 11. On the structure of the *comitia centuriata* see below, 101, 110–12.

destruction of their liberty. With the establishment of the *res publica* by the vote of the assembly, Dionysius continues, liberty was fully restored, and with it the right to legislate, according to the words he assigns to a patrician, the right of a true free man.⁴⁷ Similarly, Livy refers to the people's right to legislate as a bastion of liberty.⁴⁸ In his account, the second decemvirate represented an infringement of Roman liberty in their actions as well as in their juridical position. Not only did the decemvirate implement oppressive legislation and adopt tyrannical behaviour, it also retained power in office without election.⁴⁹

However, in order to be conducive to *libertas*, laws should be the result of a vote which itself had to meet two important conditions: it should be free, and should be equal for all. The exclusion of some members of the community from the voting procedure, as well as the subjection of individuals to arbitrary interference in the decision-making process, would inevitably have established a condition of servitude.

These conditions were essential to the establishment of the state of *libertas* and so were recognised by all Romans. They all agreed that, in order to establish liberty, it was necessary that all members of the community were entitled to vote, so that no one was left with the possibility of claiming to be forced to conduct his life according to someone else's wishes. In describing the historical development of Roman institutions, Livy, Dionysius of Halicarnassus and Cicero all emphasise the essential importance held by the universal distribution of the right to vote amongst all members of the community. Although, in describing the Servian system, these authors' primary interest lies in praising the political and military pre-eminence of the well-off, they also underline how crucial was the establishment of a voting system under which all members of the community were entitled to take part. Describing Servius' reform, Cicero states that 'He made this division in such a way that the votes were in control, not of the majority, but of the rich, and made sure – something which ought always to be adhered to in a commonwealth – that the greatest number did not have the greatest power (*ita disparavit, ut suffragia non in multitudinis, sed in locupletium potestate essent, curavitque, quod semper in re publica tenendum est, ne plurimum valeant plurimi*).'⁵⁰ In a system so devised, 'the remaining 96 centuries, which contain a large majority of citizens, would neither be deprived of the suffrage, for that would be tyrannical, nor be given too

⁴⁷ Dion. Hal. *Ant. Rom.* 4.84.3 on the voting of the assembly; on the establishment of the Republic and the restoration of liberty see 4.75.4, 5.2.2 f. and 7.56.3 and of the right to legislate as the right of free men see 9.44.6.

⁴⁸ Livy 4.5.2; cf. 6.27.6f. ⁴⁹ Livy 3.36–41. Cf. Dion. Hal. *Ant. Rom.* 11.1–3. ⁵⁰ Cic. *Rep.* 2.39.

much power, for that would be dangerous (*neque excluderetur suffragiis, ne superbum esset, nec valeret nimis, ne esset periculosum*) . . . Thus, while no one was deprived of the suffrage, the majority of votes was in the hands of those who had the greatest interest in maintaining the commonwealth in the best possible condition.⁵¹ Similarly, Livy and Dionysius emphasised that, within the strictly timocratic system of power distribution, no one should be deprived of the right to vote.⁵²

However, in order to be free, not only did all members of the community have to be equally entitled to the right to vote, but they also had to be guaranteed the possibility to do so as they pleased, that is they had to be endowed with *liberum suffragium*.⁵³

Although all shared this basic assumption, there was disagreement on how to achieve it.⁵⁴ As far as it is possible to reconstruct from the available sources, in the first century BC there were two competing views on the means deemed necessary to achieve *liberum suffragium*: one identified secrecy of vote, the other the individual exercise of civic virtue (diversified in the different sections of society) as necessary elements to liberate the votes of the citizens from arbitrary interference.⁵⁵

Although the *leges tabellariae* had been introduced in the second half of the second century, there was still a heated debate about their role and the importance of secrecy in the voting process in the first century BC. In 139 BC the tribunicial *lex Gabinia* introduced the secret ballot for elections, in 137 BC the *lex Cassia* extended it to judicial proceedings, in 131 BC the *lex Papiria* applied it to voting on legislation, and finally in 106 BC the *lex Coelia* applied it to trials for treason (*perduellio*).⁵⁶ All these laws

⁵¹ Cic. *Rep.* 2.40. For *superbus* as a characteristic of a tyrant see Baraz 2008 and Chapter 5: 244–5.

⁵² Livy 1.43 and Dion. Hal. *Ant. Rom.* 4.16–18.

⁵³ Cic. *Leg. agr.* 2.54 claims that all people should be free to vote as they please and any derogation from this practice should be regarded as a violation of liberty; Livy 4.3.7: *liberum suffragium* consists of ‘ut quibus velit [populus Romanus] consulatum mandet’. On this issue see Serrao 1978: 421ff. See also Livy 2.56.3, 4.43.12, 6.27.6ff, 40.7 and 45.2, where the people’s right to legislate as it chooses within the context of the *comitia tributa* is expressed in terms of *aequa libertas*. For a full discussion of these passages see Salerno 1999: 28–54. Cf. Sall. *Hist.* 3.34.15Mc which refers to the people’s conquest of no longer requiring *senatus auctoritas* to pass legislation.

⁵⁴ For a very interesting analysis on the issue in modern societies see Brennan and Pettit 1990.

⁵⁵ Ps.-Sall. *Ep. Caes. Sen.* 11.5: ‘There are then, in my judgment, two ways by which the senate may be given greater strength: by an increase in its numbers and by permission to vote by ballot. The ballot will serve as a screen, giving courage to act with more independence, while the increase in numbers will furnish greater protection and an opportunity for larger usefulness.’ See also Cic. *Sest.* 103, *Leg.* 3.34 and 39, *Leg. agr.* 2.4, *Planc.* 16; *Corn.* 1.50 Cr. = Asc. 78. 1C.

⁵⁶ On these laws see most recently Lundgreen 2009 with previous bibliography and Feig 2008 who very ingeniously argues that secret voting was in place only in *iudicia populi*.

are presented in our sources as a great achievement of the people and its supporters, and are always portrayed as a great bastion of liberty.⁵⁷

It is hard to judge from the surviving evidence whether, at the time of their passage, the *leges tabellariae* had met with any degree of hostility.⁵⁸ However, it seems clear that in the first century BC the issue of secrecy in the voting procedure was still considered a conceptually very important issue.

The 60s and 50s saw a burgeoning number of coins alluding to the *lex Cassia tabellaria* of the previous century. In 63 BC L. Cassius Longinus issued a coin which featured on the reverse the letter V standing for V[TI ROGAS].⁵⁹ The name of the moneyer in conjunction with the legend suggests a link with the *lex Cassia tabellaria*.⁶⁰ In 55 BC Q. Cassius Longinus issued other two coins which pictured on the reverse a voting urn and a tablet inscribed A[BSOLVO] C[ONDEMNO]. The association of the moneyer's name with the semantic visual reference to the voting urn and the letter A or C seems again to make an allusion to the *lex Cassia tabellaria*.⁶¹ However, these moneyers' choices gain particular significance if one considers that, by the first century BC, the *iudicia populi* to which the *lex Cassia* of 137 BC referred (with the exception of those for *perduellio*) had been superseded by the advent of the *quaestiones perpetuae*.⁶² Although often coins were struck off-centre (with part of the legend and type missing as a result), and people could rarely have been aware when it had been introduced, the choice of a coin-type remains revealing of the intention of the moneyer as well as of the public discourse in society at that given time.⁶³ Cassius' choice acquires full significance only if we postulate that secrecy in the voting procedure was still considered an important political advance, and one on which Cassius could reasonably hope to capitalise for his future political career.

⁵⁷ Marshall 1997 on the existence of a pre-Gracchan movement which stood for a freer expression of popular will in opposition to aristocratic control. Cf. Cic. *Sest.* 103. Numerous coins referring to those who supported the introduction of the written ballot, dated between 126 BC and 51 BC, refer to *libertas*: RRC 226/1, 386, and 428/2. Cf. RRC 473/1 and RRC 473/4. See also Taylor 1966: 35–7 and Belloni 1993. All coins commemorate Cassius' voting bill. See also the discussion in Salerno 1999: 131–5.

⁵⁸ On the hostility attested against the passage of the *lex Cassia* see Cic. *Brut.* 97. Cf. also 106.

⁵⁹ RRC 413.

⁶⁰ RRC 413 considers the design (obverse: head of Vesta) as alluding to the law of 113 BC which set up a commission to try three Vestal Virgins, presided over by L. Cassius Longinus Ravilla.

⁶¹ This is certainly the case for RRC 428/20. RRC 428/1 could again, by virtue of the obverse, be interpreted as referring to the presidency of the special commission of 113 BC.

⁶² Cic. *Brut.* 97. Cf. Cic. *Sest.* 103; Schol. Bob. 135.4–5; Ps.-Asc. 216.20–21. ⁶³ Crawford 2011: 113.

That this topic was still a subject of contention in the first century BC is also attested by the lengthy discussion dedicated to it by Cicero in the *de legibus*.⁶⁴ In this work, Cicero portrays a discussion between his friend Atticus, his brother Quintus and himself on the role that the *leges tabellariae* should play within society. 'The subject,' he says 'is a difficult one, which has frequently been investigated. The problem is this: in electing magistrates, judging criminal cases, and voting on proposed laws, is it better for votes to be recorded openly or secretly?'⁶⁵ Ultimately, the discussion turns out to be a 'pseudo-debate with no serious disagreement':⁶⁶ as Marcus Cicero says to his brother Quintus, 'My opinion is the one I know you have always held, namely, that no method of voting could be better than that of open declaration.'⁶⁷ They all agree that the introduction of the secret vote provided the Roman people with a hiding-place where they could shy away from any sense of shame and responsibility, accepting bribery and yet secretly acting as they wished.

There is no doubt that, under the oral voting system, intimidation and bribery were adopted by the nobility to exercise pressure on the voters. This was recognised as a problem needing remedy. The laws *de ambitu* passed in 181 and in 159 were the first in a long series, and were implemented less than fifty years before the introduction of the secret ballot as an attempt to curb the widespread practice of bribery in the Roman political system.⁶⁸ As Quintus himself is portrayed as arguing in the *de legibus*, the law on the secret voting 'was never desired by the people when they were free (*populus liber*), but was demanded only when they were tyrannised by the powerful men in the state (*idem oppressus dominatu ac potentia principum flagitavit*).' He goes on to argue that 'means should have been found to deprive powerful leaders of the people's undue eagerness to support them with their votes even in the case of a bad measure'.⁶⁹ In the opinion of Quintus and Cicero, however, it was a mistake that the means devised were 'the laws which ensure the secrecy of the ballot in every possible way, providing as they do that no one shall look at a ballot, and that no one shall question or accost a voter'.⁷⁰

⁶⁴ See Dyck 2004: 525 who suggests that the rather lengthy discussion mirrors the contemporary relevance of this debate. See also Plin. *Ep.* 3.20.1 and Cic. *Lael.* 41, *Brut.* 97 and *De or.* 2.170. Cic. *Sest.* 103 and *Planc.* 16 also suggest that the issue was still subject to debate in the 50s. See Yakobson 1995: 427–8.

⁶⁵ Cic. *Leg.* 3.33. ⁶⁶ Dyck 2004: 525. ⁶⁷ Cic. *Leg.* 3.33.

⁶⁸ On the relation of the introduction of the secret ballot and an actual increase of the practice of bribery see Yakobson 1995.

⁶⁹ Cic. *Leg.* 3.34.

⁷⁰ Cicero (*Leg.* 3.38–9) alludes to the Marian law of 119 BC which narrowed down the 'bridges' that the voters had to walk through in order to deposit their vote in the designated urn.

None of the participants in the dialogue recognises the secret ballot as an effective agent against bribery and intimidation, but sees it rather as a device that provided the people with 'a hiding-place, where they could conceal a mischievous vote by means of the ballot, and keep the aristocracy in ignorance of their real opinions'.⁷¹ Liberty, the status characterised by the absence of any arbitrary interference, could be achieved, they argue, only through the open vote. This voting system would deprive the people of such a hiding-place, and would force them to act according to civic virtue. Only by doing so would they be able to establish a state of freedom.⁷² Quintus and Marcus claim that with the introduction of the secret ballot the people became idle and, satisfied with the possession of the right per se, no longer exercised it with the same rigour as before. Quintus observes that 'we have records of severer condemnations of powerful men under the oral methods of voting than when the ballot was used'⁷³ and Cicero remarks that this was 'because the people are satisfied with possessing power'.⁷⁴ Thus, recognising that bribery and intimidation were certainly evils which should be eradicated,⁷⁵ Cicero put forward a different and *prima facie* rather bizarre proposal which, in principle, was not so dissimilar from the position advocated by Quintus and Atticus, and, in practice, attempted to find a compromise with the current political reality. In his opinion, the people should 'have their ballots as a safeguard of their liberty (*quasi vindicem libertatis*), but with the provision that these ballots are to be shown and voluntarily exhibited to any of our best and most eminent citizens (*optimo cuique et gravissimo civi*), so that the people may enjoy liberty also in this very privilege of honourably winning the favour of the aristocracy (*in eo sit ipso libertas, in quo populo potestas honeste bonis gratificandi datur*)'.⁷⁶

After its introduction, the voting ballot was universally conceived of as a bastion of Roman liberty, and even Cicero had recourse to it as a persuasive argument when addressing the court in defence of Plancius, and the people in the *contio* against Rullus' land distribution. Once secret voting had been introduced, the *tabella* became so deeply ingrained in Roman political culture that it would have been impossible to remove it.

However, in Cicero's opinion, the *tabella* could provide people only with a *species libertatis*, an appearance of liberty, which although regarded as a means of protection against arbitrary interference was not truly effective

⁷¹ Cic. *Leg.* 3.34. ⁷² *Contra* Morstein-Marx 1998.

⁷³ Cic. *Leg.* 3.34. ⁷⁴ Cic. *Leg.* 3.39. ⁷⁵ Cic. *Leg.* 3.39.

⁷⁶ Cic. *Leg.* 3.39. Cf. Nicolet 1970a, according to whom the preservation of the *tabella* in Cicero's proposal finds its root in Plato's Laws 753c–d, which describes the complicated voting procedure for the guardians of the law.

to this end. If anything, the introduction of the voting ballot had, in his view, corrupted the people, who no longer exercised their right to vote with a full sense of responsibility. True liberty was acquired by the exercise of civic *virtus*, which should act as bastion of liberty against intimidation and bribery and, as implied by Cicero's reference to the lack of moral vigour in condemning people, against interferences of the self.

Therefore, in Cicero's opinion, the people could achieve *libertas* by exercising their civic virtue. In their case, this coincided with the willingness to entrust the administration of power and their interests to the elite, thereby gratifying them by honest means without recourse to bribery. In Cicero's political conception, the people should be fully conscious of their place in society and exercise those specific virtues that well fitted their group. As clearly stated in the *pro Sestio* and elaborated in the *de republica*,⁷⁷ the people should act according to the *virtus* of those who belong to the higher sections of society: recognising the *auctoritas* of the leading members of the elite, to whom they willingly and contentedly entrusted the management of the *res publica*, the people should accept their own place in society and reject any part in revolutionary activities. It was the recognition of the elite's *auctoritas*, one of the central tenets of the political virtues that Cicero required from the people, that the secret ballot had taken away. 'You saw how much mischief has been caused already in the matter of the ballot, first by the Gabinian law, and two years later by the Cassian law. I seem now to see the people estranged from the senate and the weightiest affairs of the state determined by the caprice of the mob. For more people will learn how to start a revolution than how to withstand it.'⁷⁸

Fulfilling the need of the people to feel protected against arbitrary interference, the written ballot, in Cicero's proposal, provided the people with an appearance of liberty; that is, with a tool that they regarded as essential to the establishment of liberty, but that was only able to provide an appearance of it. In Cicero's opinion, true liberty was achieved by the people's responsible act of voluntarily showing their vote to the members of the elite and acknowledging the *auctoritas* of the nobility.

This debate on the adoption of the *tabella* as the most appropriate means to achieve *liberum suffragium* was based on the shared assumption

⁷⁷ See, for example, Cic. *Sest.* 104 and *Rep.* 2.69. Cf. [Chapter 3](#): 93, 102ff.

⁷⁸ Cic. *Amic.* 41. Cf. Cic. *Leg.* 3.34: 'Everyone knows,' says Quintus in attacking secret voting, 'that the laws which provided the secret ballot have deprived the aristocracy of all its influence (*omnem auctoritatem optimatum tabellariam legem abstulisse*)' and Atticus' point at *Leg.* 3.37 as well as the summary of Cicero's rationale at *Leg.* 3.39.

that *libertas* was a status established in virtue of the free exercise to vote, that is a vote not subjected to any form of intimidation and bribery, and open to all members of the community.

Despite the very significant inbuilt limitations in the Roman voting system, which obstructed or considerably reduced the actual exercise of the people's power, the principle universally shared was that Roman citizens could express their wishes by exercising their right to *suffragium*, both in electing their magistrates and in enacting the legislation under which they led their lives.

At elections, the people exercised their political right to choose, as they pleased, the person to whom they wished to entrust the administration of the *res publica*. It follows that the exercise of this right contributed to the establishment of their status of non-domination.

In Rome, holding an office was regarded as a *beneficium* that the Roman people had granted to a suitable individual.⁷⁹ Distinguished from the investiture by the *lex curiata de imperio*, by which the people approved the magistrate's authority and agreed to submit to his *imperium*, the actual election to a magistracy was perceived as a 'gift' from the people, whose choice was ultimately sovereign.⁸⁰ Cicero could claim in his speech against the land distribution proposed by Rullus that the whole people, and the whole people alone, was entitled to confer any kind of magisterial power, and any derogation from this fundamental political right would ultimately have constituted a diminution of liberty.⁸¹

Refining this position, in his ideal code of laws Cicero postulated that the senate should be exclusively composed of ex-magistrates, that is, of men who had been elected by the people, and that the censors should be divested of the powers to alter the people's choice.⁸²

Although in the period between 70 and 28 BC the census was never completed, it seems that the censors' activities came to be perceived with a growing sense of unease, as if the existence of their extensive powers, held for eighteen months and bereft of any limitations (with the exception of the two institutional restrictions of *par potestas* and *potestas ad tempus*), could constitute a danger to the preservation of the citizens' liberty.⁸³ Cicero's measure in the theoretical *de legibus* aimed to preserve the people's right to

⁷⁹ See, for example, Cic. *Planc.* 62. See also Hellegouarc'h 1963: 163–9.

⁸⁰ The best review of the debate on the *lex curiata* in the late Republic is to be found in Oakley 2005: III 492–4 (with further bibliography). See Lintott 1999: 28–9 and 49 on the controversial issue of the function fulfilled by the *lex curiata de imperio* in the late Republic. See also Magdelain 1968.

⁸¹ Cic. *Leg. agr.* 2.54. ⁸² Cic. *Leg.* 3.27.

⁸³ On the functions fulfilled by the censors in the Roman Republic: Astin 1988.

choose their magistrates as they pleased without any arbitrary intrusions and alterations by the censors. The latter could at the stroke of the pen (as it were) modify the people's choice.⁸⁴ In the incandescent political climate of 58 BC, Clodius, a tribune of the plebs and fierce opponent of Cicero, proposed a measure which introduced a system to curtail the indiscriminate and ultimately arbitrary exercise of the censors' powers.⁸⁵ According to this law, the censors were prevented from striking any men off the roll at their will and from imposing any fine unless a hearing had been held in the presence of both. Although at first sight Clodius' measure seems designed to impact on those subjected to censorial judgment, as a matter of fact it could be interpreted as a strong symbolic challenge to the censors' arbitrary power. In fact our sources attest only two cases of censored citizens who did not belong to the two *ordines*, a centurion and a *scriba*.⁸⁶ In a community which numbered at least one million citizens in Rome alone, the two censors could have passed their judgment only on those who were reported to them and ultimately focused their activities on senatorial cases.⁸⁷ It follows that Clodius' measure could be interpreted as mainly concerned with curbing the perceived powers of the censors rather than with an attempt to intervene in their actual operations in defence of those against whom their judgment was passed. In a not dissimilar way to Cicero's proposal, Clodius' measure could be interpreted as a manifestation of a sense of unease towards the ability of the censors to interfere arbitrarily with the citizens' electoral choice.

However, the people's right of *suffragium* acted as a bastion of people's liberty not only in the electoral contests, but also in legislative assemblies.⁸⁸

Laws were often associated, if not equated with, Roman *libertas* in two ways.⁸⁹ First, laws guaranteed the application of those rights which established the status of liberty for all Roman citizens on the same basis. Second, at least in principle, laws embodied the direct expression of the people's will, thereby functioning as the means which allowed the citizens to conduct their lives according to their own wishes.

⁸⁴ For a different reading of Cicero's passage in the *de legibus* see Astin 1985.

⁸⁵ Asc. 8C; Dio 38.13.2.

⁸⁶ For the *scriba* (D. Matrinius, transferred to the *aerarii* in 70 BC by the censors Gellius Publicola and Lentulus Clodianus) see Cic. *Cluent.* 126. For the centurion (unknown name transferred to the *aerarii* under the censorship of Scipio Aemilianus in 142 BC) see Cic. *De or.* 2.272 (I owe these references to Lee Moore).

⁸⁷ Lo Cascio 1997.

⁸⁸ This point is also emphasised by Schofield in his recent paper (Carlyle Lecture, Oxford, January 2012) which he kindly sent me.

⁸⁹ For the association of *libertas* and laws see the sources cited at p. 48 n. II.

With the *lex Hortensia* in c. 287 BC, which recognised *plebiscita* as binding on the whole community, the laws came to be conceived as orders that the *populus Romanus* as a whole imparted equally to all members of the community.⁹⁰ These laws, expression of the people's right to vote, guaranteed the state of *libertas* by allowing the citizens to be governed according to their own will without being subject to any form of dependency.⁹¹ As a consequence of the plebeian struggle for political recognition, the conception of *lex* as *iussum populi* underlined the role that in the process of legal enactment the people played in passing the laws.⁹² As the adoption of the formula '*velitis iubeatis Quirites . . .*' shows, by late Republic, in the conceptual development concerning legal enactments, the emphasis was very much on the people who imparted its command rather than on the magistrate who put forward a legislative proposal.⁹³ As such, the nature of the source of law was not conceived as residing in the action of a magistrate in search of the people's approval, but rather in that of the people as stipulators of final decisions.⁹⁴

⁹⁰ Note that Livy presents the *lex Valeria Horatia* as promoting the cause of liberty by providing the tribunes with the power to propose legislation. Livy 3.55 and 8.12; *Per.* 11; cf. Dion. Hal. *Ant. Rom.* 11.45. On the importance of the *lex Hortensia* in the Roman conceptual notion of law see Magdelain 1978: 77 and more in general Lintott 1999: 37–8 and 122.

⁹¹ Wirszubski 1950: 7 is not entirely accurate in claiming that *libertas* at Rome was 'a sum of civic rights granted by the laws of Rome; it consequently rests on those positive laws which determine its scope'. Nicolet 1980: 317–24 regards the connection between *lex* and *libertas* as a manifestation of liberty through the existence and effectuality of legal protections and remedies for citizens against the coercive power of magistrates. For a very similar view see Roller 2001: 230–2. However, the choice that the people made through the enactment of their legislation was concerned not only with procuring citizens' personal security against the arbitrary coercion of a magistrate, but also with a wide number of issues of an extremely diverse nature, from land distribution to legal recognition of people's choices, which cannot easily be traced back to a search for legal protection against the magistrates' abuses. The political significance of the assembly's legislative activity is most forcefully emphasised in recent scholarship by Millar 1998.

⁹² The prescription attributed to the Twelve Tables, according to which 'whatever the people last enacted was binding in law' (Livy 7.17.12, 9.33.9, 9.34.6 and 9.34.7) was a deliberate late Republican archaism.

⁹³ For the magistrates' adoption of the formula '*velitis iubeatis Quirites . . .*' see Cic. *Dom.* 80; Livy 22.10.2, 30.43.2, 31.6.1 and 38.54.3. The only complete example of the form is in Gell. 5.19.9. When the activity of the senate (or of the *patres*) is mentioned alongside that of the *populus* it is described as *decernere*, *censere*, *senatus consultum*, *auctoritas*, while usually the acts of the people are termed a *iubere* and *iussum*. See Livy 6.22.4, 7.19.10, 34.6.17, 37.19.4, 38.45.5 and 48.9. See Magdelain 1978: 77 and Serrao 1978 (=1981: 428).

⁹⁴ Magdelain (1978: 76) identifies in the third century a moment of clear shift in the conceptualisation of the process of legal enactment: 'the element of the equation are identical, but the centre of gravity is moved from one [the magistrate] to the other [the people]'. On the source of law see Jolowicz 1972: 86–7 and Watson 1971: 5–13. D'Ors 1969: 144 suggested that the verb *iubere* may have a feebleness of 'authorising' rather than expressing command; however this reading does not find support in the texts.

In the context of late Republican domestic politics, these laws, engineered by magisterial initiative and subject to comitial approval, regulated citizens' lives at all levels.

A considerable ambiguity was built into the conceptual structure which informed the procedure for approval of these laws: on the one hand, the author of a *rogatio* was a magistrate who alone had the right to initiate a legislative proposal, to which the people were solely assigned the role of responding either '*uti rogas*' (as you ask) or '*antiquo*' (I oppose [what you propose]).⁹⁵ On the other hand, in presenting his measure, the magistrate addressed the people by the formula '*velitis iubeatis Quirites . . .*' and concluded by declaring '*populus legem iubet*'.⁹⁶

Despite the preservation of this ambiguity in the formula *legem accipere* which denotes the role of the people as granting ratification to the magistrate's *rogatio* (*legem accipere*),⁹⁷ by the very end of the second century the conception of *lex* as *iussum populi* was universally shared and had become a principle fully ingrained in the common understanding of the time.⁹⁸

Cicero often referred to *leges* as *iussa populi* or even *scita populorum*, and the author of the *Rhetorica ad Herennium* explicitly stated that 'a statute law is what is sanctioned by the order of the people (*lege ius est id, quod populi iussu sanctum est*)'.⁹⁹ This notion, also attested in Sallust, Caesar and Livy, finds its most renowned formulation in the juridical writings of Ateius Capito, the jurist, consul in AD 5, according to whom a law is 'a command with general application by the people or plebs formally proposed by a magistrate (*lex est generale iussum populi aut plebis, rogante magistratu*)'.¹⁰⁰

⁹⁵ Cf. Livy 26.33.13 as possible attestation of the people's ability to elaborate a resolution of their own. Mommsen 1887–8: III 304, n.3.

⁹⁶ Cic. *Leg.* 3.16.35; Livy 4.5.2, 6.40.7, 9.34.7, 10.8.12. See Mommsen 1887–8: III 310, n.2; Daube 1956: 54 and 109; Magdelain 1978: 75.

⁹⁷ Lucilius 1088 Marx; Cic. *Inv.* 2.134 and *Mil.* 10; Varro 1 *R. r.* 2.9; Macrob. 1.16.34. *ThLL* s.v. *accipio* 318, 82. Magdelain 1978: 74–82.

⁹⁸ Office-holders were required to take an oath of obedience to the law within five days of their appointment, in public, and during daylight. See, for example, Crawford 1996a: 1.1 (*lex repetundarum*); 1.7 (*Latina Tabulae Bantinae*); 1.8 (*Tarentum Fragment*); 1.12 (*lex de provinciis praetoris*); 1.22 (*lex Gabiania Calpurnia*); 1.35 (*Ephesus Fragment*); 1.36 (*lex Fonteia*).

⁹⁹ Cic. *Rhet. Her.* 2.13.19. For *leges* as *iussa populi* see Cic. *Leg.* 1.5.17, 1.16.43, 2.5.11, 3.3.9, 3.3.10 and 3.19.44; *Phil.* 1.17.16; *Vat.* 3.8; *Pis.* 2.48; *Balb.* 17.38; for *scita populorum* see Cic. *Leg.* 2.4.8 and 3.19.44. *Lex* and *plebiscitum* could be used interchangeably: Cic. *Dom.* 49.127.

¹⁰⁰ Gell. *NA* 10.20.2. On Sallust see, for example, *Iug.* 39.3, 73.7 and 81.1, *Cat.* 29.3 and 51.22; Caes. *De bel. civ.* 1.9.2; on Livy, see, just to mention a few, 4.30.16, 6.21.6, 6.22.4, 7.19.10, 10.9.1, 21.17.5, 24.15, 27.5.16, 30.43.3, 33.25.8, 38.45.5, 51.4 and 54.12. Aelius Gallus could revealingly state that a *lex* coincided with the text of the *rogatio*. Aelius Gallus *ap. Festus* 326L: *rogatio est genus legis . . . [rogatio] non potest non esse lex, si modo iustis comitiis rogata est*

This conception was not undermined by the potential of a praetor's modifications to Roman statutes, since the praetor, who from a theoretical point of view had received his office as a *beneficium* by the people, enacted edicts which not only could have been subjected to veto, but also, if unpopular, would with all probability have been dropped by the subsequent magistrate.¹⁰¹ The ultimate power of the people, which reaffirmed the ideological centrality of the notion of laws as *iussa populi*, was their power to enact new legislation which would have automatically annulled previous objectionable laws.¹⁰²

This idea of law was so rooted in the conceptual world of the Romans that, at a time when the vast majority of laws were enacted by the emperor or the senate without even a formal recourse to the people, a Roman lawyer could still define law as 'what the people [or plebs] commands and establishes',¹⁰³ and Salvius Iulianus could assert that 'the laws are binding on us only because they have been accepted by the judgment of the people'.¹⁰⁴

Ultimately, as Brunt puts it, 'No Roman actually said, as Swift did, that "freedom consists in a people's being governed by laws made with their own consent", but this principle is implicit in the Roman system'.¹⁰⁵

Laws were also equated with liberty in another way: the rights that the people praised as guarantees of their liberty were enshrined in and guaranteed by laws. By virtue of their enactment the Roman people had managed to secure for themselves protection against the arbitrary coercion of magistrates (see, for example, the *leges de provocatione*) or the abolition of a status of servitude because of debt (as in the case of the *lex Poetelia Papiria*).¹⁰⁶ However, by having their rights enshrined in laws, the Roman people managed to achieve not only *libertas*, but *aequa libertas*, that is equality with regard to the laws. In the late Republic, referring to the origin of the *res publica*, Livy could claim that the commands of the laws

¹⁰¹ Cic. *Leg.* 1.5.17, II *Verr.* 1.109. On the praetor's edict as a source of law see Schiavone 2005: 132–5 and Riggsby 2010: 35–46. Although the *Tabula Heracleensis* (Crawford 1996: 1.24) shows that by the late Republic *senatus consulta* were regarded as source of law, the exact chronology of this phenomenon and its conceptualisation are not known. See also Chapter 3: 98.

¹⁰² Livy 7.17.12 and 9.34.6; Cic. *Balb.* 33 and *Att.* 3.23 on the people's power to enact new legislation which would have automatically annulled the previous laws. See Brunt 1988: 297. *Contra* Richardson 1998.

¹⁰³ Gai. *Inst.* 1.3: *lex est quod populus iubet atque constituit. Plebiscitum est quod plebs iubet atque constituit.*

¹⁰⁴ *Dig.* 1.3.32. See Brunt 1988: 319. Magdelain 1978: 76, n. 100 emphasises Gellius' understanding of law as the result of the magistrate's authority of putting forward the *rogatio*.

¹⁰⁵ Brunt 1988: 297.

¹⁰⁶ Livy 8.28; Dion. 16.5; Cic. *Rep.* 2.34 and *De or.* 2.255; Varro *Ling.* 7.105. However, after the passage of this law, praetors and other magistrates continued to have powers to grant a creditor *addictio*: Sall. *Cat.* 33; Quint. *Inst.* 5.10.60. See Brunt 1988: 285–6. See Chapter 1: 21–2.

were more potent than those of men, and both *libertas* and *ius aequum* (equality of rights) had been attained, whilst the codification of the Twelve Tables by the decemvirs could be described as an attempt at equalising 'freedom' or legal rights.¹⁰⁷ As Cicero repeated on different occasions, the defining trait of a free people was the enjoyment of equal rights under the law, without which they could hardly live for any considerable length of time.¹⁰⁸ In the *pro Plancio*, in an icastic form he rhetorically wonders where the equity of law and the liberty of old times have disappeared,¹⁰⁹ while in the *pro Cluentio* he identifies law as the foundation of liberty and source of *aequitas*: 'law is the bond that ensures those privileges we enjoy in the commonwealth, the foundation of liberty, the source of justice (*hoc enim vinculum est huius dignitatis qua fruimur in re publica, hoc fundamentum libertatis, hic fons aequitatis*)'.¹¹⁰ Ultimately the laws, in enshrining Roman civic rights equally for all citizens, succeeded in establishing *aequa libertas*, equality in legal rights.¹¹¹

However, laws ensured *aequa libertas* not only by guaranteeing all members of society the same rights, but also by doing so on the same basis; they guaranteed, that is, that protection did not vary across the citizen body depending on personal condition or socio-economic status, but was equal for all. No one, therefore, could consider himself immune from legal sanctions, since the law was applied to all equally. In 187 BC, according to Valerius Antias, the accuser of Scipio Africanus maintained that 'No citizen should be so eminent that he could not be questioned by the laws, and that nothing served so much to promote equal freedom as the liability of the greatest men to stand trial.'¹¹² Despite the dubious historicity of the episode, the values appealed to here show how by at least the first century BC the idea of *aequa libertas* was embodied in the notion of equality before the law.¹¹³ After all, as Cicero could claim in his ideal code, the very essence of law (*lex*) was that it bound all alike, allowing the individual 'to live with his fellow citizens in accordance with a fair and equal system of law (*aequo et pari iure*)', not in grovelling submission to others nor lifting himself above them'.¹¹⁴ He also formulated beautifully this notion in his account

¹⁰⁷ Livy 2.1.1, 3.31.7, 3.34.3, 3.61.5–7. ¹⁰⁸ Cic. *Off.* 1.88, 1.124 and *Rep.* 1.69. Cf. Cic. *Rep.* 1.53.

¹⁰⁹ Cic. *Planc.* 33. ¹¹⁰ Cic. *Cluent.* 53.

¹¹¹ Cic. *Rep.* 1.48–9; Livy 3.31.7, 34.3, 56.9 61.6 and 67.9; Tac. *Ann.* 3.27. See also Brunt 1988: 335, Wirszubski 1950: 9–15, Bleicken 1972: 35–8 and Cogitore 2011: 65–8.

¹¹² Livy 38.50.5–8; cf. 26.2.16.

¹¹³ See also Flor. 2.1.4 on Gracchus' judiciary reform that guaranteed *aequa libertas* by subjecting the senators to equestrian courts; Livy 34.54.5, Plut. *Cic.* 13, Plin. *HN* 7.117 for the reservation of the best seats at theatre for senators in 194 BC as diminution of *aequa libertas*, a reaction probably not dissimilar to that to the *lex Roscia* of 67 BC in favour of the *equites*.

¹¹⁴ Cic. *Leg.* 3.44; cf. *Off.* 1.124 and 2.85. Crifò 1981.

of the rise and fall of Roman monarchy in the *de officiis*: 'among our ancestors once upon a time men of good character were established as kings in order that justice might be enjoyed. For when the needy masses were being oppressed by those who had greater wealth, they fled together to some one man who excelled in virtue. When he protected the weaker from injustice, fairness was established and he held the highest and the lowest under an equality of justice. The establishment of laws and the institution of kings had the same cause. For a system of justice that is fair is what has always been sought: otherwise it would not be justice. As long as they secured this from a single just and good man, with that they were content. When it ceased to be so, laws were invented, which always spoke to everyone with one and the same voice (*leges sunt inventae, quae cum omnibus semper una atque eadem voce loquerentur*).'¹¹⁵

Laws, therefore, guaranteed equal liberty to all Roman citizens on the same basis. They provided all with the same set of civic and political rights (at a minimal level), including the right to vote, although not, it should be noted, the right to govern.¹¹⁶ As Cato the Elder's famous fragment states: 'it is proper that we enjoy the same rights, law, liberty, and commonwealth; glory and honour only in so far as anyone had procured them for himself (*iure, lege, libertate, re publica communiter uti oportet; gloria atque honore, quomodo sibi quisque struxit*)',¹¹⁷ and Cicero reports the orator M. Antonius to have wished 'to be equal with others in liberty, the first in honour (*libertate esse parem ceteris, principem dignitate*)'.¹¹⁸ To establish and maintain the citizens' liberty, it was important that all members of the political community shared the same rights and did so on the same basis. *Gloria*, *dignitas* and *honor*, on the other hand, were dependent on personal circumstances and merit, and could allow for individual differentiation amongst the citizen body.

If laws assured the application to all Roman citizens on the same basis of those rights in which the Romans discerned their liberty, and gave institutionalised expression to the people's will, it follows that in Rome citizens' subjection to laws was not regarded as a condition of servitude, with laws perceived as exercising arbitrary interference over the citizens' life, but rather as a means enabling the citizens to be free.¹¹⁹

¹¹⁵ Cic. *Off.* 2.41–2 (translation by Griffin and Atkins: 1991).

¹¹⁶ Wirszubski's (1950: 14) famous formulation: '*Libertas*, with regard to an individual, is merely the lower limit of political rights.'

¹¹⁷ Cato fr. 252 (Malcovati 1955: 96). ¹¹⁸ Cic. *Phil.* 1.34.

¹¹⁹ There are, however, some attestations along those lines: Plaut. *Trin.*, 1032f.; Cic. *Cluent.* 151 and *Rab. Post.* 12; Sall. *Cat.* 6.1; Livy 4.11. See also the debate on sumptuary legislation, especially against the *lex Licinia*: Arena 2011a. See Schulz 1936: 140–6 who claims that the notion of Roman liberty was structurally construed on the passive acceptance of limits imposed by the law.

In a public trial, in his attempt to persuade the jury of the innocence of Cluentius, Cicero stated that the strict terms of the law under which his client was prosecuted should be respected, regardless of whether they appeared inequitable. In order to convince his audience, Cicero famously proclaimed that all Roman citizens were in a state of servitude to the laws, since in them resided one of the institutional guarantees of freedom: 'We are all slaves of the laws in order that we may be free.' Giving voice to an opinion which must have been shared by his audience, if he entertained any serious hope of winning the case, Cicero argues that 'it is by the laws that we obtain all our blessings, rights, liberty, and our very survival'.¹²⁰

As in the case of Ulysses, who asked his sailors to chain him in order to avoid being enticed by the voices of the Sirens, so the citizens could protect themselves as a body against the threat of personal and factional interests by enacting legislation. Just as the restraining actions of the sailors were the means by which Ulysses protected himself from falling into the Sirens' trap, so the interference of the laws would protect the citizens from personal and factional interests. Since, however, this form of interference was ultimately determined by its subjects, that is, since it was not arbitrary, it would not function as an imposition of alien will but rather as a form of self-control. It follows that this sort of interference (that is non-arbitrary interference) would not reduce the people's freedom in the way that the exercise of arbitrary interference would.¹²¹

In practice, laws certainly imposed limitations on the way citizens chose to conduct their lives, and exercised an element of coercion on citizens in threatening punishment for disobedience and imposing penalties on those who contravened them. Both Livy's portrayal of the women's fight for the repeal of the *lex Oppia* in 195 BC, and, more widely, Roman Republican discourse on the opposition to sumptuary legislation, attest a sense of uneasiness towards the excessive intrusion of the laws into citizens' lives.¹²²

However, since from a theoretical point of view legislation was enacted by the concurrence of the whole citizen body, laws were perceived (or should have been perceived, as the supporters of sumptuary legislation claimed) as an expression of the general will of the community. The active contribution of each member of civic society to the formulation of laws would guarantee that no one in possession of the juridical rights of free citizens could justifiably complain that their will had been neglected. The laws allowed

¹²⁰ Cic. *Cluent.* 146. Brunt 1988: 317 interprets this passage as a reference to the rights of the higher orders, rights which were protected by law.

¹²¹ Pettit 2009: 47. ¹²² See Arena 2011a with also discussion of the sources.

the members of the community to live according to their own will, and not at the mercy of somebody else's.

Thus, for example, Livy represents Cato the Elder as claiming that it would be very shameful for the consuls to find themselves in the position of having to accept laws imposed on them by a secession of women, as formerly they had to tolerate laws imposed by a secession of plebeians.¹²³ Laws should be voted on by the whole citizen body, he claims, so that particular interests would not be allowed to prevail and a section of society would not be forced to live according to someone else's will. According to him, the only issue that should concern the voters was 'whether the proposal which is laid before you [citizens] is in the public interest or not'.¹²⁴ Participation in the voting process, without undue pressure, by all Roman male citizens assures that only laws that promote public good will be enacted. 'No law,' argues Cato in Livy's narrative, 'is entirely convenient for everyone; this alone is asked, whether it is good for the majority and on the whole. If every law which harms anyone in his private affairs is to be repealed and discarded, what good will it do for all the citizens to pass laws which those to whom they are aimed will at once annul?'¹²⁵

Thus, laws enacted by the whole citizenry and expressing the common good were a means to create a status of liberty for Roman citizens and for the Roman commonwealth. It follows that the rule of law should always be upheld if the status of liberty was to be maintained. If this was not the case, the citizens would be exposed to the discretionary powers of those in command, and thereby placed effectively in a condition of servitude.

As Sallust has Caesar argue in the *de Catilinae coniuratione*, this is what happened in Athens under the so-called Thirty Tyrants and in Rome under the Sullan regime.¹²⁶ In Athens, he says, 'these men [the so-called Thirty appointed to maintain the Spartan hold upon Athens] began at first by putting to death without a trial the most wicked and generally hated citizens, at which the people rejoiced greatly and declared that it was well done. But afterwards their licence increased (*paulatim licentia crevit*), and the tyrants slew good and bad alike at pleasure and intimidated the rest. Thus, the country was reduced to slavery and had to pay a heavy penalty for its foolish rejoicing (*ita civitas servitute oppressa stultae laetitiae gravis poenas dedit*).'¹²⁷ In Caesar's opinion (as represented by Sallust) the city of Athens, abandoned to the discretionary powers of its rulers, was reduced

¹²³ Livy 34.2.7. ¹²⁴ Livy 34.2.5. ¹²⁵ Livy 34.3.5.

¹²⁶ On reconstructing late Republican political debates by recurring to the speeches in Sallust see Introduction: 3ff.

¹²⁷ Sall. *Cat.* 51.29–32.

to a condition of slavery, and its citizens, living under the domination of their rulers, even lost their lives at the rulers' caprice.

The same point is also illustrated by an example that Sallust makes Caesar draw from recent Roman history. With Sulla's accession to power in the 80s, people like Damasippus and others of his kind 'who had become prominent at the expense of the state were executed . . . All declared that those criminals, who had vexed the country with their civil strife, deserved their fate. But that was the beginning of great bloodshed. Whenever anyone coveted a man's house in town or country or even his goods or garment, he contrived to have him enrolled among the proscribed.'¹²⁸ Thus, those who rejoiced at Damasippus' death were before too long hurried off to execution, and this did not end until Sulla provided them with all the riches they wished.

Caesar's concern, as formulated by Sallust, is that this state of affairs could occur again in Rome, if the Catilinarian conspirators are sentenced to death without trial in violation of the *leges de provocatione*. While under Cicero's leadership, he is made to claim, Rome does not incur any risk of this sort, but 'when the control of the government falls into the hands of men who are incompetent or bad, your new precedent is transferred from those who well deserve and merit such a punishment to the undeserving and blameless'.¹²⁹ Thus, when a breach is made in the rule of law, liberty will depend on the *virtus*, the moral qualities, of the leaders, and individual citizens will find themselves subject to the discretionary powers of their rulers. Against the oppression of blameless citizens by prevailing factions, Roman ancestors devised the laws of *provocatio*, which, according to Caesar, guaranteed the citizens' liberty from the coercive behaviour of a magistrate, and, by preventing any one faction from prevailing, preserved the liberty of the commonwealth from the subjection to the will of only one section of the community.

To preserve a state of liberty laws should be upheld. However, in order to do so, it was essential that laws were also known to everyone or, at least that knowledge of them was potentially available to everyone who wished to have it. Their application should not exclusively be left to those in power, from whose discretion the power of interpretation and manipulation had to be removed. In Dionysius of Halicarnassus' account of the early years of the Republic, since the consuls had retained the kings' discretion in interpreting the laws, not yet published nor fully known to the citizens

¹²⁸ Sall. *Cat.* 51.32–4.

¹²⁹ Sall. *Cat.* 51.27.

in general, the popular spokesmen fought for equality under the laws as a security of freedom.¹³⁰

As is often repeated, these texts, written at the very end of the first century BC, reflect issues and values proper to the late Republic.¹³¹ Their preoccupations must have been current at that time, since in 62 BC the *lex Junia Licinia* was passed to enforce more strictly the provision of the *lex Caecilia Didia*, which required that laws should be promulgated three *nundinae* before they were proposed to the *comitia*, and further enacted that, in order to prevent forgery, a copy of every proposed statute should be deposited before witnesses in the *aerarium*.¹³² This proposal once again reinforced the idea that a proper knowledge of the laws, alongside the possibility of them being altered at the discretion of whoever might have access to the text, was crucial to the establishment and preservation of liberty.

Conceptually elaborated as the antonym of the metaphor of slavery, Roman political liberty corresponded to the status of the citizen *sui iuris*. This status, characterised by the absence of the possibility of being arbitrarily interfered with in the exercise of one's own choice, was commonly understood as the basic meaning of liberty, established by the possession of civil and political rights, and guaranteed by the rule of law. The juridical matrix composed by the right to *provocatio*, the right to *suffragium* and the legal prerogatives of the tribune of the plebs, expressed in the laws, allowed Roman citizens to conduct their lives according to their own wishes and without experiencing subjection to the whims or preferences of others.¹³³

By the late Republic no one claimed that the right of *provocatio* should be dispensed with, or that the tribunate of the plebs, despite all the troubles for which it might have been considered responsible in the commonwealth, should be abolished *tout court*. Both legal and institutional bastions of Roman liberty were even preserved in Cicero's ideal code which, by his own admission, was conceived as the legal and institutional framework of the best *res publica*.

¹³⁰ Livy 2.1.1–6; Dion. Hal. *Ant. Rom.* 4.9.9, 4.11.2, 4.72.3, 10.1, 29.4ff. Brunt 1988: 335.

¹³¹ On the use of the sources see Introduction: 2–5. See Richardson 2008: esp. 122–31 for the best account on the use of Livy's history of early Rome in the pursuit of history of ideas.

¹³² Cic. *Vat.* 33, *Phil.* 5.8, *Sest.* 135, *Att.* 2.9.1 and 4.16.5; Suet. *Caes.* 28.

¹³³ Wirszubski 1950: 7 is correct, but incomplete, when he states that '*libertas* at Rome and with regard to Romans is not an innate faculty or right of man, but the sum of civic rights granted by the laws of Rome; it consequently rests on those positive laws which determine its scope', since this formulation does not take into full account the role of laws as expression of popular will, and thereby as a means necessary to the establishment of liberty.

These institutions were so ingrained in the Roman political culture of the Republic that, by the first century BC, they were perceived as essential to the preservation of citizens' liberty. Therefore, the disputes about their role, when they occurred, were ultimately concerned with the limitations that should be applied to these rights and institutions, but not with their very existence.

In practice, however, this legal and institutional matrix was not sufficient on its own to protect the citizen's liberty, since, in the reality of the dynamics of power relations, the actual protection of an individual's liberty would require more than simply the establishment of a magistracy or the enactment of laws, however powerful and well thought-out they might be.

In order to protect fully the citizen's liberty, alongside certain institutional arrangements, it was necessary, for example, to implement an actual distribution of political power, that empowered the weakest sections of society, limited the elite's supremacy, widened access to knowledge and fostered the free exercise of public opinion.

However, although in the so-called 'struggle of the orders' the plebeians are also represented as fighting for these forms of protection, they are not presented as part of those basic rights essential to the establishment of the citizens' status of *libertas*.¹³⁴ In the Roman society of the late Republic, the actual redistribution of power, the creation of an informed public opinion or the diffusion of knowledge were conceived of as important means of strengthening and preserving the citizens' status of liberty, but, however essential, were not counted amongst Roman basic liberties.

In the late Republic, the Romans agreed that, in order to be free, two important conditions should be met: first, all citizens should be equally endowed on the same basis with the same basic liberties, and second, that the constitutional arrangements of the commonwealth in which they lived should be of such a nature as to enable the commonwealth to be in the position neither to exercise any form of domination over its citizens, nor to be itself dominated by any external power. The next chapter will investigate the notion of a free commonwealth as held by the Romans of the late Republic.

¹³⁴ For an interesting reading of the notion of *libertas* in Livy's account of the struggle of the orders as a felt concept see Hammer 2008: 103ff.

CHAPTER 3

The liberty of the commonwealth

For the Romans of the late Republic, an individual could act as a free citizen (that is he was in possession of those rights that allowed him to enjoy the life of a free citizen) only when living in a free commonwealth.

The Romans conceived the freedom of the commonwealth in the same terms as the freedom of the individual citizen.¹ As the loss of political liberty of the individual Roman citizen was analysed in terms analogous to those of falling into a condition of enslavement or servitude, so too the loss of liberty of a commonwealth was conceptualised and expressed in these same terms.² According to late Republican writers, to describe a civil association as free was to say that this association was not in a condition of dependence upon the will of another, but on that of its citizen-body as a whole.

Building on the metaphor of the body politic as human body, and conceiving the absence of liberty of the commonwealth as a condition of domination, they maintained that the status of liberty could be lost under two distinct circumstances.³ First, they claimed that the liberty of the commonwealth could be lost when a civic community falls into a condition of dependence on another community, usually as a result of conquest. Second, and more importantly in the late Republic, they maintained that a civic community loses its liberty when it falls under the power or control of an agent distinct from the sovereign body of the citizens, be it either a monarch or a group of people.⁴ In both cases, the language adopted to describe the commonwealth's condition of enslavement or servitude was the same as that adopted to describe the person's loss of liberty.

In describing the loss of liberty of a whole community as a result of conquest, the Romans expressed the concept of domination by an

¹ See Wirszubski 1950: 5. ² See Chapter 2.

³ Wirszubski 1950: 4–5. On the metaphor of the body politic see Barja de Quiroga 2007c: 99–126 and below 99, 114–16.

⁴ Cf. Livy 3.61.1–3.

external power by reference to the condition of slavery, whilst describing the sovereign independence of a people as being a community *in sua potestate* or under *suae leges*. Livy, for example, describes the people of Collatia, under the kingship of Tarquinius Priscus, as renouncing the holding of their own *potestas*, when they surrendered ‘themselves, the city, the lands, water, boundary marks, shrines, utensils, all appurtenances divine and human into a condition of servitude to the king and the Roman people (*omnia in meam [the king’s] populi que Romani dicionem*)’, just as in 396 BC the people of Veii or in 167 BC Macedonia and Illyricum had come *in potestate populi Romani*.⁵

The community that loses its liberty is reduced to living in a condition of dependence on the goodwill of those into whose power it has fallen and who are thereby able to exercise their alien will over them. Thus, the dominated community is not in control of its own affairs and lives at the mercy of the dominating people, who may exercise compassion towards them or even follow the wishes of those conquered, but who still retains the power to modify their behaviour at its whim. Thus, in 210 BC Scipio, out of his goodwill, decided to send home the prisoners who had fallen *in potestate populi Romani*, sparing their lives and restoring them to a status of liberty; whilst in 195 BC Cato decided to sell at auction the citizens of the Spanish communities which had been reduced to the subjection of the Roman people (*in potestate populi Romani*).⁶

Thus, a community was in a condition of servitude when in someone else’s *potestate*, that is under the power or the dominion of anyone but its own citizen-body. This latter predicament was described as being subject to *suae leges*, which corresponded to the Greek αὐτονομία, and which was qualified by Livy in the words of a Greek spokesman as the possession of *libertas*, ‘which stands upright by means of its own strength without depending on the will of anyone else’.⁷

The second circumstance in which a commonwealth could lose its liberty was when an agent, a group or an individual, arrogated to himself or themselves the power to make laws binding on the whole community.⁸ When discussing Carthage’s political affairs at the very beginning of the second century BC, Livy describes the order of the judges acting as *domini* (*iudicum ordo Carthagine ea tempestate dominabatur*) over the Carthaginian citizens, who, left in the *potestas* of the latter, had their property,

⁵ Livy 1.38.2. See also, for example, Livy 8.2.11, 8.25.5, 9.16.10, 9.25.3, 24.21.12, 24.22.4, 24.29.12. On Veii see Livy 5.20.3 and 45.16.7.

⁶ Livy 26.49.8 and, 34.16.9–10.

⁷ Livy 35.32.11. See also 37.54.26 and 33.32.5.

⁸ Wirszubski 1950: 5.

reputation and lives under the judges' control (*res fama vitaeque omnium in illorum potestate erat*). In this commonwealth, which Livy describes as a *regnum*, by virtue of their *superbia* and *opes*, the judges behaved as above magistrates and laws ('*ordinem iudicum, prae quorum superbia atque opibus nec leges quicquam essent nec magistratus*'). In Livy's opinion, the Carthaginian commonwealth had been reduced to such a condition of slavery by the institutional and legal arrangements which protected the judges' position within the commonwealth. Their power was for life and was strengthened by two main factors, a corporate attitude which was so powerful that if 'a man offended one of the judges he made enemies of them all', and the absence of a system of accountability, since no one could be found 'to bring accusations before the hostile judges'.⁹

In the picture drawn by Sallust in *de Catilinae coniuratione*, a similar destiny to that of Carthage had befallen Rome. In words ascribed to Catiline, the *res publica* has fallen into a state of subjection to the *pauci potentes*, and requires the loyalty and the support of Catiline's followers in order to be freed from servitude (*in dicionem*) to their dominium. 'My resolution,' says Sallust's Catiline, 'is fired more every day, when I consider under what conditions we shall live if we do not take steps to emancipate ourselves (*nisi nosmet ipsi vindicamus in libertatem*). For ever since the commonwealth fell under the jurisdiction and sway of a few powerful men (*postquam res publica in paucorum potentium ius atque dicionem concessit*), it is always to them that kings and potentates are tributary and peoples and nations pay taxes. All the rest of us, energetic, able, nobles and commons, have made up the mob, without influence, without weight, and subservient to those to whom in a free commonwealth we should be an object of fear.'¹⁰ The same language as Sallust's, which describes the act of restoring the commonwealth's liberty in the same terms as those adopted to describe the procedure of slave manumission (*vindicare in libertatem*), is also found in the *Res Gestae*. There Augustus famously claims to have liberated the *res publica* from the domination of the *pauci* (*rem publicam a dominatione factionis oppressam in libertatem vindicavi*), once again equating the commonwealth's condition of oppression at the hands of a group to the condition of subjection to arbitrary interference experienced by slaves.¹¹

A similar description to this, of oppression, that is, by a group of people, is also given by Roman authors when they portray the commonwealth's fall into a condition of servitude at the hands of a single individual, often

⁹ Livy 33.46.iff.

¹⁰ Sall. *Cat.* 20.6–7.

¹¹ *RG* 1.1. See Roller 2001: 214 and 252.

therefore represented as a tyrant. Cicero refers several times to the condition of servitude into which the commonwealth had fallen as a result of Caesar's and, later, Antony's pre-eminence.¹² When the *res publica* fell under Caesar's control, Cicero claims, it lost its capacity to act according to its own will and thereby fell into a condition of slavery. Although other eminent members of the community might perceive Caesar's decisions as appropriate, no sense of true satisfaction could arise from these resolutions, since the commonwealth was in a state of servitude. These resolutions, in fact, had been taken not by the whole community, but by a single individual, at whose mercy the *res publica* lived. Caesar carried out these enactments as a *dominus* and the commonwealth was *in sua potestate*: what was in his power to concede was also in his power to revoke (*ab hoc ipso quae dantur ut a domino, rursus in eiusdem sunt potestate*).¹³ As the coin issued by Brutus in 43/2 BC shows (Figure 4, in Chapter 1), Caesar could be depicted as a tyrant, who imposed his will over the whole community and reduced it to a condition of slavery, a condition which was conceived and expressed in the same terms as that of individual slavery, as the visual language of the *pilleus* indicates. Caesar's assassination could therefore be qualified as tyrannicide, the enactment of which restored the liberty of the commonwealth as a status of non-arbitrary interference.¹⁴

In a letter to Cicero, Asinius Pollio widens the focus of the discussion from the specification of Caesar's role in the commonwealth to that of any individual who arrogates to himself the power to impose his will on the rest of the community. Describing the commonwealth's loss of liberty as a falling under another's *potestas*, it is the existence of the *dominus* per se, regardless of his identity, that deprives the *res publica* of its liberty: 'If events are so developed as to put all power again in the hands of one man, whosoever that man is, I declare myself his foe; and in defence of liberty there is no danger from which I should either hold back or seek to excuse myself (*rursus in potestate omnia unius sint, . . . pro libertate*).'¹⁵

Although on the whole Roman independence was not a paramount concern to contemporaries, it was clear that for late Republican Romans the preservation of liberty required the maintenance of the community's undominated status, and hence was strictly linked to the notion of power on which it rested.¹⁶ Roman dominion over the empire guaranteed the *res publica* the absence of arbitrary interference from external powers.

On coins Libertas was represented either wearing the diadem of victory, or accompanied by Victoria crowning her, or even on the obverse of coins

¹² See, for example, Cic. *Phil.* 3.8–9, 3.35–6; *Div.* 2.6; *Fam.* 6.5.3, 7.28.3. See Arena 2007a.

¹³ Cic. *Att.* II.20.1.

¹⁴ See Chapter 1: 42.

¹⁵ Cic. *Fam.* 10.31.3.

¹⁶ See below 142–3.



Figure 5 Denarius – Vibius Pansa (48 BC) RRC 449/4.6

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Description: silver coin

(obverse) Laureate head of Libertas right; behind, inscription. Border of dots.

(reverse) Roma, helmeted, seated right on pile of arms, holding sceptre in right hand and placing left foot on globe; on right flying Victoria crowning Roma; on left, inscription.

Border of dots.

with Victoria crowning Rome on the reverse (Figure 5).¹⁷ This conceptual link between the ideal of *libertas* and the notion of Victoria, also hinted at by the concomitant date of the *dies natalis* of the temple to Juppiter Libertas and the temple to Juppiter Victor, was an expression of Rome's privileged position as world power, which assured her liberty from the domination of external powers.¹⁸ As Cicero states, 'Rome far excels other states in the prerogative of freedom'; as she 'alone is and has always been in the highest degree free', while 'other nations can bear servitude, but liberty is proper to the Roman people', since by divine will Rome rules over all other races.¹⁹

However, if, on the one hand, the awareness of Rome's position as a world power made the analysis of the loss of liberty as a result of conquest less prominent in the political discourse of the late Republic, on the other hand, Sulla's dictatorship, Pompey's extraordinary powers, the establishment of the so-called first triumvirate, Pompey's sole consulship and Caesar's dictatorship (just to mention some of the most remarkable political events of the first century BC) could have been, and indeed were, described as destroying the liberty of the commonwealth.

¹⁷ *Libertas* wearing a diadem see RRC 391.3 or crowned by Victoria RRC 391.1. See also RRC 449.4 with Crawford's interpretation. *Contra* Brunt 1988: 292–3.

¹⁸ See Chapter 1: 34–6.

¹⁹ Cic. *Leg. agr.* 2.29; *Rab. Perd.* 33; *Cat.* 2. 11; *Rab. Post.* 22; *Phil.* 6.19; cf. 11 *Verr* 5.163; *Cat.* 4.24. See Brunt 1978 and most recently the summary on the issue by Erskine 2010.

The rise to power of individuals or groups, who could impose their will on the commonwealth and ultimately its citizens, was described as a predicament where the community had fallen into a condition of slavery, whose body politic was thereby divested of its capacity to act according to its own will.

All Romans agreed that, in order for the commonwealth to be free from domination of an external power as well as from domination of an internal agent, be it an individual or a group, the civic community had to be self-governing; the citizens' sovereign body had to be in control of the decision-making process. Only in such a community could the liberty of the individual citizens be upheld. As a result, an essential condition for the liberty of the commonwealth was that the people had to be the source of law, the actual expression of the citizens' will, and geared towards the common good. In addition, the rule of law ought to be always upheld.²⁰ This belief was deeply shared by all Romans, whatever their political persuasion or contingent political stance, since the laws were the essential means whereby the liberty of individual citizens, as they all understood and conceived it, could be protected.²¹

According to the Romans, for the citizens to be free, it was not sufficient merely that they acquired the rights which protected basic Roman liberties. Although, according to ancient tradition, some of the rights conceived as guarantors of liberty, such as the right to *provocatio* and the right to *suffragium*, had already come into existence under the monarchy, under those circumstances Roman citizens were not considered able to enjoy a free life for two fundamental reasons.²² First, they were not able to act as free men, because not all the basic rights ensuring they could live as free men had been established. Second, even if they could have enjoyed all those basic rights which protected their liberty, they would not have been able to conduct a free life in a commonwealth governed by a monarch or a faction and thus itself unfree, since it rested upon the goodwill of those in power.

However, although all Romans of the late Republic shared these principles, they disagreed on the legal and constitutional arrangements to be implemented in order to establish and preserve the commonwealth which could best protect the citizens' liberty. What they disagreed on were the conditions and means by which *libertas* could be sustained or lost, and the

²⁰ See [Chapter 2](#): 63ff.

²¹ Note Cato's arguments against the repeal of the *lex Oppia* as reported by Livy 34.2.1–4.19: the law is for the common good, but women are unable to recognise it as such. See above 66, 68–9.

²² See, for example, Cic. *Rep.* 2.43.

related issue of how much liberty each social and political group should be allowed to have and exercise.

The kernel of the disagreement lay in the institutions and laws which should be implemented in order for the commonwealth to be a self-governing community. The different formulations that popular sovereignty could take and the institutional specifications that it should embody constituted a conceptual divide within the intellectual world of the late Republic.

Diverging on the institutional and political means to achieve and preserve liberty, these two distinct styles of political reasoning can be described as two separate ideological ‘families’ present in the wider Republican tradition of thought.²³ Formulated in late Medieval Europe, Republicanism was a notion (as well as a term) unknown to late Republican thinkers and politicians. Adopted by modern historians, from reflection on ancient Roman texts, as a heuristic term of taxonomy to give a retrospective shape to the past, it posits as the centre of attention the unifying feature of the ‘Republic’ as the key constituent unit of political life, fostered by a nostalgic view of the collapse of the Roman *res publica*.²⁴

Within this wider tradition, it is possible to identify two different, but in themselves more or less homogeneous, families of thought, drawn from Greek philosophical texts, which in the intellectual world of the late Republic displayed two distinct orientations on questions relating to fundamental evaluative terms such as liberty, justice and sovereignty.²⁵ Thus, contrary to the persuasive claim that Roman public debates were dominated by an ideological monotony, it is possible to identify two distinct intellectual traditions of ‘Republicanism’, two styles of political reasoning, which yielded two different set of referents for those essential values such as justice or liberty.²⁶

These two intellectual traditions, which I have called ‘optimate’ and ‘popularis’, should not be confused with reified philosophical systems. They formed two distinct views which ultimately articulated two different conceptions of politics, nourished by Greek philosophy but without identifying themselves with any specific philosophical doctrine.²⁷ These two intellectual traditions came to be deployed in the political struggle of the late Republic and assumed a life of their own, finding a new set of associations and references in Roman political discourse.

²³ See Introduction: 7. ²⁴ See Nelson 2006 and Nadon 2009: 529.

²⁵ See Introduction: 7. For an application of a similar methodology see the lucid analysis in Nelson 2004.

²⁶ Morstein-Marx 2004: 204–40 with specific reference to conitional debates.

²⁷ For the issue of ideology and the distinction between *populares* and *optimates* see Introduction: 7–8.

As Griffin has most convincingly argued, Greek philosophy provided politicians at Rome with the language and conceptual framework in which choices could be made and justifications articulated. As she very effectively puts it, 'to write or speak in philosophical terms, even insincerely, is to think in those terms'.²⁸ These intellectual traditions did not require the politicians' personal and permanent commitment to the doctrine of a specific school, nor to the style of reasoning proper to one or the other of these traditions. Rather, they provided them with political ideas and values against which to examine the issues at stake and positions adopted.

Confronting these two intellectual traditions, the so-called 'optimat' and 'popularis', it is possible to detect two basic positions on the nature of institutional arrangements, especially in regard to the role of the popular assembly and the notion of justice, which organised Roman political discourse of the late Republic.

The main authors of 'optimat' tradition displayed a significant homogeneity as to the political reasons why one should prefer the mixed constitution as the best form of government. Despite considerable differences, these authors shared on a basic level certain orientations on justice and the means to achieve liberty. Drawing from Dicaearchus, Polybius and Cicero (but also Livy, Dionysius of Halicarnassus and, to a certain extent, Pseudo-Sallust) propounded a conception of *res publica* which, whilst recognising that sovereignty lay with the people, gave considerable predominance to the senate.

The 'popularis' tradition, on the other hand, became prominent in Roman political discourse with the tribunes of the Gracchi in the second half of the second century BC. Informed by Greek philosophy, it saw the civic community as the ultimate owner of all goods and empowered its institutional form, the popular assembly, to arrange their fair distribution. A submerged ideology, it is attested only in fragments of speeches and the reported discourse of the democrats in Cicero's *de republica*. These attestations, however fragmentary, show a clearly shared way of thinking about politics which is very much distinct from the 'optimat' way of reasoning. Basing their Republican framework on a significant role for the popular assembly, they advocated a form of corrective justice which required the implementation of some scheme designed to secure a more egalitarian distribution of property. Since the enactment of wealth redistribution was highly controversial, their shared understanding of justice, based on the notion that each section of the political community is entitled to the

²⁸ Griffin and Barnes 1989: 36.

same amount of power, led them to fight for equality (at least) of political rights. Ultimately, therefore, the two intellectual traditions differ in the institutional arrangements they consider necessary to preserve the *libera res publica* and on the related issue of how much liberty each section of society is entitled to have.

As mentioned above, no Roman politician was univocally devoted to one or the other intellectual tradition, and it is certainly not the case that those politicians who are often described in our sources as *optimates* made exclusive recourse to the ‘optimate’ tradition of thought, nor that those described as *populares* (even just for the year of their tribunate) constantly adopted the ‘*popularis*’ tradition.

These intellectual traditions provided Roman politicians, whatever their stance or personal inclination, with the conceptual categories to analyse political issues, frame their choices, and justify their actions. However, the fluid nature of their application should not hide them from our sight.

THE LIBERTY OF THE COMMONWEALTH: THE ‘OPTIMATE’ TRADITION

The authors of the so-called ‘optimate’ intellectual tradition displayed similar orientations on questions relating to liberty, justice and sovereignty. Drawing from Greek philosophy, from Plato to Dicaearchus and Polybius, they shared the belief that the best, and indeed only, means to preserve the citizens’ liberty, understood as a condition characterised by the absence of dependence on someone else’s will and guaranteed by a series of rights, was the organisation of constitutional arrangements as a mixed and balanced constitution.

Despite some, at times significant, differences of emphasis, Polybius, Cicero and Dionysius of Halicarnassus all claimed that the best form of government to preserve the citizens’ liberty was a mixed and balanced constitution, primarily for two reasons.²⁹ First, they all claimed that this form of government, based on the criterion of distributive justice, allowed for diverse social interests to be valued in their difference and be kept in a state of equilibrium. Second, they maintained that by allowing the participation in governance of all political and social groups in a fashion commensurate with their economic status, and recognising the role of popular sovereignty in entrusting the administration of power to the senatorial elite, the mixed and balanced constitution neutralised the tensions between the mass of citizens and the social–political elite.

²⁹ Polyb. 6.10.6; Cic. *Rep.* 1.69; Dion. Hal. *Ant. Rom.* 7.55.2.

The idea of the mixed constitution as a perfect form of government had long been in circulation. The first time it is attested in the extant literature is in Thucydides.³⁰ Describing the Athenian form of government that had succeeded the oligarchic regime of the so-called Four Hundred, Thucydides states that during the new rule of the Five Thousand 'the Athenians were better governed than ever before, at least during my time; for there was a moderate blending (μετρίᾱ . . . ξύγκρσις) of the few and the many'. Although this blending was a compromise regarding the social composition of the ruling class (composed, at least in theory, of the few wealthiest and the wealthier of the many remaining citizens), in referring to this solution as a better option than either democracy or oligarchy, Thucydides was adopting the categories of Greek political thinking developed from at least the fifth century BC.³¹ If in fact in Pindar there is an allusion to a classification of governments as the rule by one (monarchy), by a few (oligarchy) and by many (democracy),³² in Herodotus the famous constitutional debate on the merits of these three forms of constitution is extensively discussed amongst Persian nobles.³³ Although its historicity is rather dubious, the representation of the debate shows the development of a kind of reasoning that assesses constitutions in terms of the proportion of citizens involved in ruling: the one, the few and the many.³⁴ Thus, by referring to a moderate blending or mixture, Thucydides was transcending the trichotomy of one–few–many, making a very significant intellectual move.

This notion of a mixed constitution, used by Isocrates to describe government and promote his political agenda,³⁵ was later applied rigorously to constitutional theory by Plato and Aristotle, before being also applied to Roman government, prominently by Polybius and Cicero.

Plato appealed to constitutional mixing or blending for both constitutional stability and civic virtue and happiness. However, Plato, in his analysis of Sparta's government, replaces Thucydides' binomial with all three forms of simple constitutions, represented by the different bodies of government, the king, the γερονσία (council of elders), and the ἔφοροι (ephors, Spartan magistrates).³⁶ In this new conception of constitutional mixture, Plato introduced the notion later re-elaborated by Polybius and, to a certain (minor) extent, Cicero, according to which for the community to function properly, these constitutional elements had to co-operate with

³⁰ Thuc. 8.97.2; cf. Gomme, Andrewes and Dover 1945–81: v 330–40.

³¹ Cf. Thuc. 8.65.3; Meier 1990. ³² Pin. *Pyth.* 2.86–8.

³³ Hdt. 3.80–3. ³⁴ Pelling 2002a. ³⁵ Isocr. *Panath.* 153.

³⁶ On Sparta see Pl. *Leg.* 3.691d–692a and 4.712d–e. For Plato's discussion of the mixed constitution see also Pl. *Menex.* 238c–d with Alders 1968: 32–3.

one another, and, if necessary, implement mutual checks on those that stepped out of line.³⁷

In Plato's opinion, this mixed constitution would be preserved from civil strife, but would not reach ἐλευθερία (liberty), φιλία, (friendship, that is consensus within society) and φρόνησις (wisdom, that is political judgement), without which there is no good government.³⁸ In order to achieve these, Plato advances a different kind of mixture, the blending of two constitutions, monarchy and democracy, from which all other constitutions derive.³⁹ In his opinion, with this constitutional mixture, harmony, virtue and happiness would reign amongst the citizens, as each would possess his individual liberty while being subject to the authority of rational leadership.

Aristotle reacted strongly to Plato's constitutional theory and claimed that the most viable constitution was 'neither democracy nor oligarchy, but a midway (μέση) between them, the constitution called "polity"'.⁴⁰ He conceived of a constitutional mixture as the sharing of governing authority amongst the constituent economic groups, namely the wealthy and the poor, a sharing that, in his opinion, produced stability. 'For a constitution to be secure and stable it is necessary that all the parts desire it to exist and to remain the same as it is.'⁴¹ Since each section of society had a stake in the government, it was most likely that each of them would work to preserve such a government. Aristotle does not rely on the system of mutual checks amongst the constituents of the *politeia*, but rather counts on the fact that each of them, having a share of rule, will act for the common good (as it comprises their separate good).⁴²

However, whilst the theory of a mixed constitution had not been a central tenet of the political theory of Plato and Aristotle, but had developed almost incidentally in their quest for the best constitution, with Dicaearchus the strategic importance of this form government acquired centrality and independent theoretical value.

Author of a 'Constitution of the Spartans', which every year was publicly read in the *ephors'* palace before the young Lacedaemonians, Dicaearchus of Messana, Aristotle's pupil of the first half of the fourth century BC, had also composed the Τριπολιτικός (at times identified by scholars as the work on the 'Lacedaemonian Constitution'), which most likely proposed the view of Sparta as embodying the best form of government in the

³⁷ Hahn 2009: 180–5.

³⁸ Pl. *Leg.* 3.693b–d and 3.701d. On this passage see Schofield 2006: 77–84, according to whose reading, however, Plato's political philosophy is not interested in constitutions as such.

³⁹ Pl. *Leg.* 3.693d–e; Laks, 2000: 278–85.

⁴⁰ Ar. *Pol.* 2.3.6.1265b26–9. Cf. Graeber 1968: 93–101 on the mixed constitution in Plato and Aristotle.

⁴¹ Ar. *Pol.* 2.6.9.1270b21–2. ⁴² Miller 2000: 325–32.

triple mixture of monarchy, aristocracy and democracy.⁴³ Unfortunately, his work has not survived. However, Photius refers to a Byzantine source, *Περὶ πολιτικῆς*, which describes this tripartite mixed constitution as εἶδος πολιτείας . . . Δικαιοκρατικόν, that is as *genus Dicaearchi*.⁴⁴ Although often taken to mean ‘the justly ruled state’, the qualification of this form of constitution as Dicaearchic may rather stand to underline Dicaearchus’ original contribution to constitutional theory.⁴⁵ It is not implausible, although not beyond doubt, to hypothesise that Dicaearchus’ true innovation laid in the elevation of the tripartite mixed constitution, as embodied in Sparta in fourth-century political analysis, to a heuristic device to be applied to constitutional theory.⁴⁶ Rather than the result of a more or less precarious balance between pre-existing constitutional forms, Dicaearchus’ view of the tripartite mixed form of government as a constitution in its own right might have played a very significant role in Polybius’ as well as in Cicero’s political analysis.⁴⁷

Whilst Polybius explicitly refers to him (although, admittedly, on questions of geography) and may have adopted him as his principal source for the basic structure of his constitutional theory, Cicero, as often recognised, owes much of his constitutional analysis to Peripatetic views, which he seems to derive not from Aristotle’s writings, but more likely from Dicaearchus’ works.⁴⁸ Cicero refers to Dicaearchus as ἱστορικώτατος (the most learned) and the *peripateticus magnus et copiosus*, and in two letters of 45 BC is seeking to read his treatises, amongst which figured the *Τριπολιτικός*.⁴⁹

⁴³ Athenaeus (4.141a–c = fr. 72W = fr. 87M) and Suda s.v. Dicaearchos (= fr. 1W = fr. 2M). See Bertelli 1963: 175–209 who postulates, rather convincingly, but not conclusively, that the ‘Constitution of the Spartans’ constituted in actual fact a section of the *Τριπολιτικός*. See also Rawson 1991a: 82–3.

⁴⁴ Photius *Bibl.* 37 = fr. 71W = fr. 88M.

⁴⁵ Wilamowitz 1924: I 64, n.1 suggests that the term Δικαιοκρατικόν does not have anything to do with Dicaearchus, but rather refers to the two terms of the compound as ‘just rule’.

⁴⁶ Gabba 1984: 33–4; Bodei Giglioni 1986: 629–52; Carsana 1990: 22–3.

⁴⁷ Lintott 1997a: 73 even hypothesises that he may be also acclaimed as the founder of the ‘check and balance’ theory.

⁴⁸ For Cicero’s familiarity with Dicaearchus *Att.* 2.9.2, 2.12.4, 2.16.3. *Cic. Rep.* 1.29.45 and 1.45.69 perhaps reproduce Dicaearchus’ ideas. On Cicero’s Peripatetic sources Solmsen 1933: 326–41 (= 1968: 380–95); Pöschl 1936: 10–39; Cole 1964: 440–86, esp. 447, n. 19; Aalders 1968: 83–4 and 1975: 108; Frede 1989: 77–100 and, more in general, Fortenbaugh and Steinmetz 1989. On Polybius’ reference to Dicaearchus see Polyb. 34.5–6; cf. 34.9.4. On the open question of the sources for Polybius’ theory of the mixed constitution a trend of scholarly works initiated by Osann 1835–9: II 23ff. has persuasively argued for Dicaearchus as Polybius’ main source.

⁴⁹ *Cic. Att.* 6.2.2 and 13.32.2; *Off.* 2.16; cf. Photius *Bibl.* 37 = fr. 71W = fr. 88M.

The popularity that Dicaearchus' works enjoyed in the first century BC is also attested by their presence, alongside Antisthenes' *Cyrus* and Cotta's *de republica*, in Atticus' library, whilst Varro, who apostrophises him as *doctissimus homo*, even adopted Dicaearchus' Βίος Ἑλλάδος, the first history of Greek civilization and culture, as a literary model for his *de vita populi Romani*.⁵⁰

Before Polybius fully exploited and re-elaborated the analytical device of the mixed constitution to interpret Roman imperial success, it is clear that by the third century BC the mixed constitution had entered the common language of constitutional theory and interpretation.⁵¹ Not only in the third century did an unknown Greek author read Rome's institutions within the conceptual grid of the mixed constitution (as one must assume by extricating the full implications of a fragment of Eratosthenes), but also in the first half of the second century BC Cato the Elder is attested as adopting this analytical tool to describe the Carthaginian constitution.⁵² In his *Origines*, in fact, Cato described Carthage's form of government as composed of three parts (which he very revealingly termed *politiae*), that of the people, of the aristocracy and of the king.⁵³ The consideration that Polybius, writing at approximately the same time as Cato, dedicates to the Carthaginian constitution and his evaluation of its form of government on the basis of the conceptual category of the mixed and balanced constitution have led Cato's relation to Polybius to be the subject of considerable scholarly speculation.

Although in his work Polybius repeatedly mentions Cato,⁵⁴ there is no conclusive argument either in favour or against a direct dependence by Cato on Polybius regarding the idea of the mixed constitution. Rather than proving that Cato owed his reading of the Carthaginian political system to conversations with Polybius, to a familiarity with Aristotle's *Politics* or perhaps even with Dicaearchus' political treatises, Servius' attestation of Cato indicates that by the time Cato began composing the first books of his *Origines*, approximately between 174 and 154 BC, these analytical tools

⁵⁰ Cic. *Att.* 13.44.3; cf. Ath. 6.273b, although he quotes it simply for a historical fact about Britain; Varro *Rust.* 1.2.16; Ax 2001. On Dicaearchus see Fortenbaugh and Schütrumpf 2001.

⁵¹ See Lintott 1999: 214–19 on the antecedents on Polybius' mixed constitution; Aalders 1968: 7–30 and 52–3 on Solon. See also Nippel 1980: 30–158.

⁵² Eratosthenes links together Rome and Carthage as examples of two commonwealths which were run extremely well. See Rawson 1991a: 101.

⁵³ Cato, fr.80 Peter = Serv. 4.682. On the mixed constitution of Carthage see Ar. *Pol.* 2.8.2.1273a; Polyb. 6.51.2; Cic. *Rep.* 2.42. Nicolet 1974: 209–58, esp. 250; Nippel 1980: 143, n.3.

⁵⁴ Polyb. 19.1.1, (= Plut. *Cato maior* 10.3), 31.25.5a, 36.14.4ff., 39.1.5ff.

had become the standard currency to interpret current political realities as well as make wider intellectual claims on the best form of government.⁵⁵

Following a suggestion of Pohlenz, it is possible to find a further hypothetical attestation of the widespread success of this idea in the second century BC.⁵⁶ Considering the well-known, however generic, assertion of Dio- genes Laertius, which claimed that the Stoics favoured the tripartite mixed form of constitution (composed of democracy, aristocracy and monarchy) as the best *politeia*, and combining it with Cicero's picture of Panaetius as the philosopher '*semper . . . habuit in ore Platonem, Aristotelem, Xenocratem, Theophrastum, Dicaearchum, ut ipsius scripta declarant*', it is not completely implausible (although still rather hypothetical) to maintain that according to Panaetius the best form of government was a composite of monarchic, aristocratic and democratic elements.⁵⁷

However, it is with Polybius that, in the Roman context, the application of the mixed and balanced constitution as an analytical category came to the forefront. In his search for the means that allowed Rome to conquer 'virtually the entire world' in less than fifty-three years, Polybius found his answer in Rome's mixed and balanced constitution.⁵⁸ In his opinion, this was the best constitution to create the necessary conditions of stability by limiting the ruling power's security.⁵⁹ Contrary to Sparta, whose mixed constitution was deliberately created by a lawgiver, Lycurgus, with an intentional plan, the Roman mixed and balanced constitution had evolved naturally, arising from 'struggles and actions in which the Romans repeatedly chose the better course'.⁶⁰

Polybius' analysis is also to be found in Cicero's *de republica*, which, it should be noted, attributes it to Cato. Attesting that the *Origines* were still read in the first century BC not only as a work of history, often consulted on early Rome, but also for their interpretation of the Roman political system, Cicero reports that Cato praised the Roman constitution because

⁵⁵ Grimal, 1985: 233–77, esp. 238 and Nicolet 1974: 250. For different position on this debate see Astin 1956: 159–80, esp. 167–8. The relation between Cato and Polybius has been the subject of a certain amount of speculation: see Nicolet 1974: 209–258, esp. 243–55 who argues for an 'ideological' dependence of Polybius on Cato. *Contra* Momigliano, *ibid.*: 261. On the complex relation between these two authors see also Garbarino 1973: II 343–8 and Musti 1978: 103–43, esp. 128–9.

⁵⁶ For the attribution of this idea to Panaetius see Pohlenz 1948–9: II 102; for Chrysippus see von Arnim 1921: III fr. 700.

⁵⁷ Diog. Laert. 7.131 and Cic. *Fin.* 4.79. On the danger of using Cicero's *de re publica* to identify Panaetius' and Posidonius' thinking see Ferrary 1988a: 363–81. See Devine 1970 on the Stoics' best regime. Erbse 1951: 161 postulated that Panaetius had been highly impressed by Polybius' application of the theory of the mixed constitution to Rome.

⁵⁸ Polyb. 1.1.5, 6.2.3; cf. 3.1.4.

⁵⁹ Polyb. 6.3.7–8 and 6.10.1–11. See Hahm 1995 and 2000.

⁶⁰ Polyb. 6.10.14.

it was not the result of one legislator's actions, but rather the consequence of the whole people's collective effort over several generations.⁶¹

Polybius' constitutional interpretation was no doubt also one of the main sources of Cicero's *de republica*.⁶² In this political treatise, Scipio Aemilianus claims that the best form of government is the mixed and balanced constitution as embodied by early Rome.⁶³ Cicero explicitly mentions Polybius in the work and refers to the educative and learned discussions that Scipio Aemilianus entertained with Panaetius and Polybius himself, whom he had welcomed in his house. There is no doubt that Cicero's work owes much, not only to Plato and the Peripatetics, but also to Polybius, whose work assumed a significant stature in the constitutional theory of the Roman Republic.

His name is also frequently alluded to, at times polemically, in Dionysius of Halicarnassus' *Ῥωμαϊκὴ Ἀρχαιολογία* the composition of which began about twenty years after Cicero's completion of the *de republica*.⁶⁴ In this work, through the speech of Manius Valerius, Dionysius offers what is described by Gabba as 'the fullest theoretical presentation of a programme advocating a mixed constitution for the Roman republican state'.⁶⁵ Addressing the people on the theme of civic *concordia* and the participation of all elements of society in running the commonwealth, Manius Valerius is reported to have said that 'if anything is going to be the means of preserving this commonwealth and insuring that she shall never be deprived of her liberty or her power, but shall ever continue to be united and harmonious in all respects, the most effective instrument will be the populace if taken as partners in the administration of affairs; and what will benefit us above everything will be, not to have a simple and unmixed form of government administering the state, whether monarchy, oligarchy, or democracy, but a constitution combined out of all of these'.⁶⁶

As in Cicero, so in Dionysius, only within a mixed and balanced constitution, composed by a blending of the three simple forms of government,

⁶¹ Cic. *Rep.* 2.2. Astin 1978: 217 and 225–6 is sceptical that this fragment may belong to the *Origines*, but does not reject Cicero's attribution to Cato. Cf. also Polyb. 6.10.12–14. On the relation between Cato and Cicero see Villa 1949: 68–70. For one example of citation from the *Origines* see Livy 34.5.7. On the relation between Cato and Livy see Tränkle 1970: 274–85. Cato's *Origines* are also cited by Varro in *Rust.* 1.2.7 = *Orig.* fr. 43 Peter; 2.3.3 = *Orig.* fr. 52P; 2.4.11 = *Orig.* fr. 39P.

⁶² On the relation between the two texts see Ferrary 1984 with also discussion on previous scholarship.

⁶³ Arena 2007a. ⁶⁴ See Dion. Hal. *Ant. Rom.* 1.6.1; 1.7.1; 1.32.1; 1.74.3.

⁶⁵ Gabba 1991: 144. See Noé 1979: 105–7. and Carsana 1990. On the source of Dionysius see Gabba 1982: 807–11.

⁶⁶ Dion. Hal. *Ant. Rom.* 7.55.2.

monarchy, aristocracy and democracy, the citizens may hope to conduct in full harmony the life appropriate to free men.⁶⁷

These were the most important authors for the formation of the 'optimate' canon of ideas about the *res publica* and about the best means to guarantee its political liberty, and it is on these doctrines as they emerge from the surviving writings of these authors that I shall now concentrate.

In discussing the topic of political liberty and how it is preserved in the mixed and balanced constitution, all these writers advance the same major claims. They all suggest that the commonwealth's liberty could only be maintained in a mixed and balanced constitution for three main reasons.

The first claim is that political liberty is assured only in a mixed and balanced constitution because only this form of government displays a distribution of power through different political *loci* such that none in the commonwealth, neither an institutional body nor its related section of society, could overpower the rest. The basic assumption these thinkers shared is the notion that the distribution of power is an essential precondition to ensure that no member (or part or institution) of the body politic could gain such power that they could overshadow the others, thereby assuming a position of domination over the civic community.⁶⁸

However, far from the modern idea according to which the preservation of a commonwealth's liberty resides in the distinct separation of the legislative, executive and judiciary powers, the distribution of powers, as conceived and applied in Rome within the arrangements of the mixed and balanced constitution, was rather based on the interdependence and necessary co-operation between the three political and institutional bodies as represented by the magistrates, the senate and the popular assemblies.⁶⁹

Although thinkers might differ on the elaboration and emphasis of the features of the three principal components of the mixed and balanced constitution, at a basic level they all conceive this form of government in analogous terms. In the words of Scipio in the *de republica*, 'a moderate and balanced form of government which is a combination of the three primary forms of commonwealth (*aequatum et temperatum ex tribus optimis rerum publicarum modis*). I am of the opinion that there should be something outstanding and royal in a commonwealth, something else should be also

⁶⁷ The textual coincidences between Dionysius' and Cicero's works, most notably evident in the discussion of the Servian constitution, have induced scholars to postulate their common dependence on a same late Republican source, which Gabba has identified as a pamphlet composed in the 70s. See Gabba 1960: 175–225, 1961: 98–121, 1982: 807–11. *Contra* Baldson 1971.

⁶⁸ With regards to Roman magistrates this notion is often described as *par potestas* see Wirszubski 1950: 22–5.

⁶⁹ See, for example, Montesquieu 1748: II 6; on Rome II 12–19. See Pani 2010: 52.

granted to the authority of aristocrats, and some things left to the judgment and the desires of the masses.⁷⁰

Thus, if Polybius' analysis is centred round the μέρη, the parts which represent the three simple forms of government (in Rome, the two consuls, embodying the monarchic form, the senate, embodying the aristocratic form, and the popular assemblies, embodying the democratic form) whose institutional prerogatives he describes at length, Cicero places primary emphasis on the elements of value inherent in each of the three simple constitutions.⁷¹ In Cicero's *de republica*, the regal element, provided by the consuls, was manifested in *imperium*, the consuls' executive power; the aristocratic element, provided by the senate, was expressed in their *consilium*, the senate's ability as a wise aristocratic council to offer advice on policies; finally, the democratic element, provided by the popular assemblies, was articulated in terms of *libertas*, the people's right to elect magistrates and enact laws.⁷² This Ciceronian analysis, however, finds its completion in the *de legibus*. In this work, Cicero himself, after dealing in some detail with rules concerning magistrates, the senate and the people, asserts that the discussed law code is formulated for the very same mixed and balanced constitution described in the *de republica*, the distinctive trait of which is the distribution of power: 'This is the blended commonwealth which Scipio praises in that other book and which he most approves of, and it could not be brought to pass without such a distribution of offices. You must know that a commonwealth is bound up with the magistrates and those in charge, and from their organization can be understood what sort of commonwealth each is. And since this was established with great wisdom and moderation by our ancestors, I had little or nothing which I thought need to be reformed in the laws.'⁷³ Although in the *de republica* the notion of power distribution is articulated in terms of principles (such as *imperium*, *consilium* and *libertas*), it becomes clear from the *de legibus* (which had been conceived at the same time as the *de republica*) that for Cicero too the most important facet of the mixed constitution in ensuring the liberty of the commonwealth is in the institutionalised distribution of powers.⁷⁴

⁷⁰ Cic. *Rep.* 1.69.

⁷¹ Nicolet 1974: 225–7 on Polybius' use of μέρος; Walbank 2002: 283; Hahn 2009: 183.

⁷² Cic. *Rep.* 1.55, 1.69, 2.57; on the weakness of the simple forms of government see 1.43, 1.53. On the role played by these values in Cicero's mixed constitution see Zetzel 1995: 7–11 and Atkins 2000: 491–3.

⁷³ Cic. *Leg.* 3.12.

⁷⁴ Ferrary 1984 on the nature of Cicero's analysis as more (or less) abstract than Polybius' account. On the composition date of the *de legibus* see Girardet 1983.

Differing not too much from Polybius, and similarly from Cicero, in his historical account Dionysius of Halicarnassus describes the mixed constitution as combining not merely three governing bodies, but rather three governments, each embodying the essential and best properties of the three positive forms of government (kingship, aristocracy and democracy). When the single components are mentioned, they are used to indicate a specific section of society in its capacity to participate in government through its designated political institution.⁷⁵

Although the key feature of the mixed constitution that these thinkers all praise equally is the absence of a sole centre of power in the government's administration, the way in which they conceptualise the components of this constitution becomes of crucial importance in their attempt to devise a strategy against its degeneration. As Hahm has observed, 'determining the relevant agents was crucial, for unless the source of the conflict was correctly identified, the opposing components could not be reconciled'.⁷⁶

All these different constitutional variations recognised that the mixed constitution, with its inbuilt distribution of power amongst its institutional and socio-political constituents, was not in itself sufficient to preserve the commonwealth's liberty. They all noted that, on the one hand, the rulers were inclined to be affected by a sense of security and a state of luxury, and, on the other, the exploited were ruled by a sentiment of hostility that could push them to the point of rebellion. However, they disagreed on the system to put in place to promote self-control and moderation and, ultimately, ensure stability.

In regard to Rome, Polybius identified this system in a series of 'checks and balances' between opposing government bodies, conceived in such a manner that each of these organs could not function without cooperating with one another.

While Aristotle did not seem concerned with finding a balance between conflicting forces, but rather with the fusion of the aristocratic right of the wealthy to some privilege and the democratic right to equally shared liberty, in his analysis of the mixed and balanced constitution Polybius seemed to adopt and re-elaborate Plato's idea of the relation between government bodies. According to the latter, although the organs of government were endowed with the possibility of obstructing each other's actions, they would not have acted in such a fashion as the individuals who constituted those bodies, since their awareness of the limited scope of their authority and of the need for collaboration would have restrained their impulses to act

⁷⁵ Dion. Hal. *Ant. Rom.* 2.14, 7.55, 10.6.

⁷⁶ Hahm 2009: 197.

in their own self-interest.⁷⁷ Polybius, on the other hand, imagined the interaction between the constituent parts such that each was prevented from carrying out its function without the cooperation of the other two sections.

According to Polybius, the Roman constitutional system was built on the absence of autonomy for individual bodies, since each part could not function without the support and cooperation of the other two institutional components. In his opinion, of the arrangements of Roman institutions, interwoven, as it were, in a rather complex web of interdependency, it was not the separation of powers which acted as a liberating agent, but rather the mutual dependence of the three components and their power to cooperate as well as obstruct each other in the achievement of a common goal.

This was a mechanism first devised, according to Polybius, by Lycurgus.⁷⁸ Understanding the principles of constitutional degeneration, Lycurgus 'brought together all the virtues and distinctive features of the best [single] constitutions, so that none might grow beyond its proper point and change into its corresponding evil, but rather, with the force of each being counteracted by [that of] another, none would tilt [the scale] and outweigh the others for any length of time, but the constitution would over time be balanced in equilibrium, and would last indefinitely, in accord with the principle of countering forces'.⁷⁹ Thus, the stability of the Spartan mixed constitution depended on the condition that none of its components assumed complete control, and with it the sense of absolute security that initiates oppressive rule.⁸⁰

A similar principle was adopted in Rome. As Polybius explains in detail, the consul, invested with the highest military power, requires the support of the people as members of his army, and the support of the senate, which alone can enable him to bring his operations to a conclusion.⁸¹ The senate, whose consent is necessary to provide the soldiers with the necessary supplies, has the power, when the consul's year in office has expired, to retain him in office or supersede him as well as to award him the celebration of a triumph. The people, on the other hand, is the sole body that can ratify or annul terms of peace and treaties, and to which the consul, on laying down his office, is obliged to account for his action.⁸²

⁷⁷ For a parallel between Polybius and Aristotle see Lintott 1997a: 72. For his relation with Plato's ideal see Hahm 2009: 191–4.

⁷⁸ On the difference between the Spartan and the Roman mixed constitution see Hahm 1995: 470–4.

⁷⁹ Polyb. 6.10.6–7 (trans. by Hahm 2000, adapted). ⁸⁰ Polyb. 6.10.8–10.

⁸¹ Polyb. 6.15.2–11. ⁸² Polyb. 6.15.

The issue of accountability to the people, as emphasised by Polybius and later on by Dionysius of Halicarnassus, is of essential importance for the preservation of the commonwealth. In order to restrain the magistrates endowed with executive power from acting in a tyrannical manner, at the end of the year in office a magistrate was expected to give a speech to the people to account for his actions. If, during his period in office, he had acted illegally, *non iure*, he was subjected to the legal procedure of *iniuriae*. Only the tribunes of the plebs could initiate this prosecution of ex-consuls and their case was heard, until the second century BC, before the *iudicium populi*. As Greenidge put it, 'up to the time of the development of the *quaestiones*, [the tribunes of the plebs] represented the chief means which the state possessed of enforcing criminal responsibility upon its executive'.⁸³

The senate, for its part, in Polybius' account is dependent on the people for punishing the most important offences against the commonwealth and for preventing the implementation of legislation detrimental to its interest, since it is the people alone which have the power of passing or rejecting any legislative measure. In addition, the tribunes of the plebs, who are always obliged to act as the people decree and to pay attention to their wishes, can interpose their veto, which could put on hold any decision of the senate.⁸⁴ Finally, the people depend on the senate for public contracts of constructions and repairs as well as for the exploitation of navigable rivers, harbours and mines, and on the consuls for subordination to their authority on the military field.⁸⁵ Therefore, Polybius comments, 'the power of each of the parts either to harm the others or to cooperate is such that their union is adequate for all situations. Thus, it is impossible to find a better form of constitution'.⁸⁶

When faced with a danger from abroad, the components of the constitution are compelled to act together in concord and to support each other. 'They all compete in devising means to meet the need of the hour . . . and all co-operate both in public and in private to accomplish the task which they have set themselves; and consequently this peculiar form of constitution possesses the irresistible power of attaining every object upon which it

⁸³ Greenidge 1911: 234; cf. 182–3. For a list of occasions from all Republican periods when the tribunes took judicial proceedings against consuls and other senior officials see Mommsen 1887–8: 1 700–4, II.i. 322, n.2. The first two examples of prosecutions for misuse of public money are that of M. Acilius Glabrio in 189 BC (Livy 37.57.12), which was ultimately withdrawn, and that of L. Scipio, probably in 187 BC (Gell. 6.19.5) recorded as without earlier precedent (*nullo exemplo*).

⁸⁴ Polyb. 6.16.

⁸⁵ Polyb. 6.17. On the oddity of the identification of the people's restraint by the senate as the reliance of the *publicani* on the senate to secure their contracts see Walbank 1995: 215.

⁸⁶ Polyb. 6.18.1.

is resolved.⁸⁷ However, when peace and prosperity bring wealth and ease of living, which in turn fills the Romans with arrogance and *hybris*, liberty comes under threat. 'For when one part having grown out of proportion to the others aims at supremacy and tends to become too predominant . . . the purpose of the one can be counterworked and thwarted by the others, none of them will excessively outgrow the others or treat them with contempt. All in fact remains *in statu quo*, on the one hand, because any aggressive impulse is sure to be checked and from the outset each estate stands in dread of being interfered with by the others'.⁸⁸ Thus, in Polybius' view, it is a system of 'check and balances', which, by engraining the notion of the mutual dependence of the three components, guaranteed the commonwealth's liberty and imperial power.

Like Polybius, Cicero claimed that the best form of government was the mixed and balanced constitution with an aristocratic bias, and again like Polybius he thought that the best form of government was the only one properly suited to preserve the liberty and the splendour of the commonwealth.⁸⁹ However, contrary to Polybius, Cicero did not identify the system of institutional 'checks and balances' as an essential factor to the preservation of the commonwealth's liberty. In his opinion, the perfect constitution maintained its stability and avoided the prevalence of sectional interests thanks to each section of society fulfilling its individual functions in the exercise of its capacities.⁹⁰ In this manner, the mixed and balanced constitution, whose civic members work together in harmony (like musicians playing their own tunes), maintains the liberty of the commonwealth by guaranteeing 'concern for all interests and respects for all rights'.⁹¹

This notion of a consensual society, held together by a just organisation where each element is granted its due importance, fades into the background in Dionysius of Halicarnassus' historical account. Alluding polemically to Polybius in his discussion of the simple forms of

⁸⁷ Polyb. 6.18. ⁸⁸ Polyb. 6.18.

⁸⁹ Pöschl 1936: esp. 72ff. and Ferrary 1984: 87–92 emphasise Cicero's dependence on Polybius' work. In the *de re publica*'s dialogue (set in 129 BC), Laelius is made to refer to frequent conversations Scipio Aemilianus entertained with Panaetius in Polybius' presence about political constitutions, and in which Scipio had argued in favour of the ancestral Roman constitution as by far the best of all constitutions (Cic. *Rep.* 1.34). There is no reason to doubt that not only did Cicero know Polybius' work well, but also that, despite his adoption of Plato's *Republic* as a model and his subjection to the influence of Peripatetic thought, his work was also informed by that of his Greek predecessor either by following or by rejecting his line. For the aristocratic bias of their mixed constitution see below 95ff.

⁹⁰ On the difference between Polybius and Cicero see Cole 1964; Walbank 1972: 130–46; Nippel 1980: 142–6; Ferrary 1984: 91–2; Lintott 1997a: 80–5; Asmis 2005.

⁹¹ Wirszubski 1950: 83. On the musical metaphor see Cic. *Rep.* 2.69.

government,⁹² Dionysius makes Manius Valerius claim that 'each of these forms of government by itself alone very easily degenerates into violence and lawlessness' and that in order to avoid this degeneration, the senators 'have found all possible devices to prevent the monarchical power from degenerating into tyranny, [since they] have appointed two magistrates instead of one with control of the city, and having entrusted this magistracy to them, not for an indefinite time, but only for a year, they nevertheless appoint, as guards watching over them, three hundred patricians, at once the best and the oldest, of whom the senate is composed'. However, to Valerius' eyes, they do not seem 'to have appointed any to watch over [themselves], to insure [their] remaining within proper bounds'.⁹³

'Nevertheless, if the people are also granted their share in government,' Valerius continues, 'no evil will arise for you [the senators] here.' In his opinion, even in the perfect mixed constitution there may be a breakdown in the commonwealth's system as a result of two possible circumstances. First, the mixed and balanced constitution might degenerate because of the machinations of a powerful man, which, combined with the actions of influential senatorial circles, could destroy the delicate equilibrium of the constitution; second, the constitutional degeneration could take place because of corruption or predominance of the plebeian elements.⁹⁴

The mechanisms which Dionysius of Halicarnassus identifies as rectifying these circumstances are of two different kinds. When the first case occurs, the constitutional balance is re-established by the mechanism of individual accountability before the people. The tribunes of the plebs call the person aspiring to tyranny before the popular assembly, where 'he will have to give an account of both his actions and his purpose, and if found guilty, suffer the punishment he deserves'.⁹⁵ When the second scenario occurs and the people are seduced by demagogues and conspire against the better citizens, the remedy lies in a dictator appointed by the senate. A 'person of exceptional acumen, appointed as dictator will guard and protect against anything lawless; for, being invested with absolute and sovereign power, he will remove the diseased part of the city and will not allow the part not yet affected to be contaminated; having corrected in the best manner possible the habits, usages and rivalries of the citizens, and having appointed such magistrates as he thinks will govern the commonwealth with the greatest prudence; and having administered these affairs for six

⁹² Carsana 1990: 30. On Dionysius of Halicarnassus and his debt to Polybius and Cicero see Aalders 1968: 117–19.

⁹³ Dion. Hal. *Ant. Rom.* 7.55.3–5.

⁹⁴ Dion. Hal. *Ant. Rom.* 7.56. ⁹⁵ Dion. Hal. *Ant. Rom.* 7.56.

months, he will again become a private citizen, receiving only honour and nothing else for these actions'.⁹⁶ In this scenario, the dictator's primary function is to curb popular agitation in the interest of the common good, and, by initiating a recasting of the ethical principles for civic cohabitation, his role is intended to re-establish and strengthen the balance of the mixed constitution.⁹⁷

A second and, to a certain extent, related claim that these thinkers share is that the liberty of the commonwealth is maintained in this composite form of constitution because the provision of regulations for active citizenry allows the potential tensions between the mass of the citizen body and the socio-political elite to be successfully defused. Thus, this neutralisation of conflicts is achieved by the mixed and balanced constitution because, whilst the people are recognised as the sovereign power, the actual focus of command is assigned to the senate.

In Polybius, while the deviant or unimproved constitutions are characterised by the rulers' adoption of force and fear, or, in the case of democracy, of bribery and corruption in order to govern, the good forms of government are ultimately based on the consent of the governed, earned by fair and just political leadership.⁹⁸ In his account of the origin of kingship, Polybius states that 'when the leading and most powerful person always applies his strength in support of the aforesaid [moral notions] held by the people, and his subjects become aware that he is one who apportions to each as he deserves, they submit to him, no longer because they fear his force, but rather because they approve of his judgment and they join in preserving his rule'.⁹⁹

According to Polybius, in good forms of constitution the formal power lies with the people, as it is they who elect the civic-minded magistrates in whose hands resides executive power. However, it is the actual dependency of those who hold executive power on the people, accomplished through the people's power to elect (or ratify, in the case of a king) them which creates the state of insecurity and vulnerability which acts as a restraint against possible degeneration into a negative form of government.¹⁰⁰

A not dissimilar line of argument is advanced by Cicero in the *de republica*. In Scipio's famous definition of a commonwealth, building on the metaphor of *res* as property, he claims that the *res publica* is the property

⁹⁶ Dion. Hal. *Ant. Rom.* 7.56.2. ⁹⁷ Gabba 1991: 144–5.

⁹⁸ See Polyb. 6.4.2, 6.6.10–12, 6.8.4–5 (the role of consent by the governed is implicit in these passages) and on deviant form of democracy see Polyb. 6.9.5–7; Hahm 2000: 465–6.

⁹⁹ Polyb. 6.6.10–11 (trans. by Hahm 2000).

¹⁰⁰ See Polyb. 6.7.4–9, where the case in point is kingship and its degeneration into tyranny.

of the people.¹⁰¹ Scipio asserts that the commonwealth is like a trust which the people offer freely to the magistrates, to whom they entrust the administration of power in the pursuit of the common good.¹⁰² Not only were the kings of Rome also elected by the people, but in the mixed constitution popular election conferred legitimacy on the executive powers of the magistrates and on the authoritative deliberation of the senate, while removing the detrimental possibility of direct government.¹⁰³ In these authors' opinion, in order to preserve the liberty of the commonwealth, popular power, so conceived, should be part of the proper constitutional balance of the mixed constitution.

The implementation of this equilibrium does not necessarily entail the achievement of a perfect equalising balance, where each constitutional component possesses an amount of power identically equal to the other two in nature and extension. Rather, the equilibrium which these authors regard as ideal and most appropriate favours the preponderance of the aristocratic element, and thereby, in the institutional form, the senate as true centre of power.

In comparing Carthage with Rome and assessing the reasons behind Roman success against its Punic enemy, Polybius identified the reason for Carthaginian weakness as the state of decline of its constitution at the moment of its encounter with Rome. 'For by as much as the power and prosperity of Carthage had been earlier than that of Rome, by so much had Carthage already begun to decline; while Rome was exactly at her prime, as far as at least her system of government was concerned. Consequently the multitude at Carthage had already acquired the chief voice in deliberations; while at Rome the senate still retained this; and hence, as in one case the masses deliberated and in the other the most eminent men, the Roman decisions on public affairs were superior, so that although they met with complete disaster, they were finally by the wisdom of their counsels victorious over the Carthaginians in the war.'¹⁰⁴ The fact that, according to Polybius, at Carthage the δῆμος (the people) had acquired the chief voice in deliberation, which at Rome was at the time of the Hannibalic war still in control of the senate, rather than showing that the 'ideal constitution' was not so much a mixed constitution but

¹⁰¹ Cic. *Rep.* 1.39.

¹⁰² Cic. *Rep.* 1.51–2, 2.56, cf. 3.45; *Off.* 1.85, 1.124. See the excellent study by Schofield 1995a. Wirszubski 1950: 82 and Kohns 1977: 205 identified Cicero's free form of commonwealth in the mixed constitution.

¹⁰³ Atkins 2000: 492–3. On the elections of the kings see Cic. *Rep.* 2.25, 2.31, 2.33, 2.35, 2.37–8; cf. 2.23, 2.43.

¹⁰⁴ Polyb. 6.51.6–7.

rather an aristocracy, reveals where Polybius believes true power should be located in a mixed constitution.¹⁰⁵ In fact, as Pöschl first pointed out, the fact that the deliberation at the time of the Hannibalic war was still in the hands of the best people (the aristocracy) is not an indication that Rome really was an aristocracy, but is rather in line with the proper functioning of the mixed constitution when at its prime (ἀκμή). In this constitution the chief voice of deliberation is one of the senate's prerogatives, which shows that Rome had not yet begun the downward process of decline which had already started in Carthage, where deliberation was in the hands of οἱ πολλοί (the multitude).¹⁰⁶ According to this intellectual tradition, Rome's mixed constitution at its prime had a predominantly aristocratic bias.

There is no contradiction, then, in stating that the best form of government is the mixed and balanced constitution and in emphasising that in this arrangement the senate should play the most relevant role: in the administration of power the senate may not, and should not, be omnipotent, but should be preponderant.¹⁰⁷

In Cicero's constitutional balance, characterised by a mixture of *consilium*, *libertas* and *imperium*, the nature of government is identified by the location of *consilium*, corresponding to the aristocratic element, the senate, which will assure its stability: 'Every commonwealth . . . must be ruled by some sort of *consilium* in order to be permanent.'¹⁰⁸ In his discussion in favour of aristocracy as a form of government Scipio argues that 'when the aristocrats take care of the commonwealth then the citizens must necessarily be the most blessed: they are free of every care and worry, having handed over their tranquillity to others whose duty it is to look after it with vigilance so that the people do not believe that their interests are being neglected by their leaders'.¹⁰⁹ In Cicero's *de republica*, very much in line with the position he argues in the *pro Sestio*, the people are fully taken care of and do not need to ask for more. The mixture that Cicero approves is aristocratic, with plebeian rights conceived of as necessary concessions to the interests of liberty, justice and stability, rather than the reward of self-assertion and victory in social conflicts.¹¹⁰ The constitutional mixture that Cicero advocates is ultimately, in Aristotelian terms, of an aristocratic nature, where the council of the best citizens, who are better suited to form

¹⁰⁵ Nicolet 1974: 238–43 and 1983b.

¹⁰⁶ Polyb. 6.13, 6.16; cf. 23.14.1 where Polybius defines the Roman mixed constitution as aristocratic. See Pöschl 1936: 61. For a close refutation of Nicolet's argument see Walbank 2002: 277–83. On the senate's legislative powers see Crifò 1968: 53–61 and below 98.

¹⁰⁷ Ferrary 1982: 747. ¹⁰⁸ Cic. *Rep.* 1.41. See Atkins 2000: 491–2.

¹⁰⁹ Cic. *Rep.* 1.52. ¹¹⁰ Lintott 1999: 223.

policy than a single individual, and certainly wiser than the people as a whole, are elected according to virtue and wisdom, rather than birth.¹¹¹ As Book 2 shows, Rome historically reached the perfect mixed and temperate constitution thanks to the accumulated experience of elite groups, which through generations implemented improvements and managed to reach the best constitution.¹¹²

In the *pro Sestio*, composed two years before the *de republica*, Cicero asserts that ‘in the civil community organised in the wisest possible way by our ancestors (*a maioribus sapientissime constitutam*) they put the senate in place as the commonwealth’s guardian, bulwark, and defender; they intended that the magistrates rely upon the senate’s authority and be the ministers, as it were, of its most weighty wisdom; moreover, they intended that the senate itself be supported by the splendid estate of the orders next in rank at the same time that it preserved and increased the plebs’ liberty and material advantages’.¹¹³ Thus, in the best constitution set up at Rome by the ancestors, the senate was the pivotal institution and its authority predominant in the commonwealth, the magistrates were conceived as its ministers, and the people, animated by a complete confidence in those to whom they entrusted the administration of their own interests, were regarded as its supporters.

According to Cicero, as he also reiterates in the *de legibus*, ‘If the senate is in charge of public deliberation (*dominus publici consilii*), and if the remaining orders are willing to have the commonwealth guided by deliberation of the leading order, then it is possible through the blending of rights, since the people have power and the senate has authority, that that moderate and harmonious order of the state be maintained.’¹¹⁴ In advocating that the senate’s advices should be valid even in the face of tribunician *intercessio* and acquire the force of law,¹¹⁵ Cicero presents the best constitution as the result of a moderate *temperatio* between the senate’s *auctoritas* and the people’s *potestas*, where the magistrates act as reliable enactors of the senate’s wisdom.¹¹⁶ This perfect blending, Cicero argues, might be reached

¹¹¹ Cic. *Rep.* 1.52, 2.15, 2.56–8, 2.67, 2.69; cf. 1.51–3. Cf. *Ar. Pol.* 4.1293b and 1298b.

¹¹² Cic. *Rep.* 2.2, 2.37. Perelli 1990: 53–68 carefully analyses the aristocratic nature of Cicero’s mixed and balanced constitution. Cicero also highlights the importance of a *rector* for the preservation of this constitution. See most recently Asmis 2005 and Arena 2007a.

¹¹³ Cic. *Sest.* 137 (trans. by Kaster 2006). ¹¹⁴ Cic. *Leg.* 3.28 (trans. by Zetzel 1999).

¹¹⁵ Thomas 1977: 189–210 according to whom Cicero may here institutionalise a measure which was already matter of practice. Cf. the *Tabula Heracleensis* (Crawford 1996a: 1 24) and the suggestive parallelism in Cic. *Rab. Perd.* 3 with Mitchell 1971.

¹¹⁶ See Cic. *Leg.* 3.12–16 on the magistrates’ role. On the people as repository of *potestas* see Cic. *Har. Resp.* 11; *Rep.* 1.42; *Leg.* 2.17; *Sall. Jug.* 31.11, 31.20; *Hist.* 1.48.13Mc, 3.34.6Mc; *Ps.-Sall. Ep. ad Caes.* 2.3.3; *Livy* 1.17.8; with discussion in Laser 1997: 26–31. See Ferrary 1984 on Cicero’s conception of a bipartite/tripartite structure of Roman constitution.

if the senate is 'in charge of public deliberation', the other orders are willing to follow its leadership, and if the senators themselves are able to conduct themselves as a models of *virtus* and wisdom.¹¹⁷

The preoccupation with a morally strong senate, to which a central role in the government of the commonwealth is assigned, is also prevalent in the Pseudo-Sallustian *Second Letter to Caesar*, probably dated to 50 BC.¹¹⁸ The author proposes a reform of the commonwealth which aims at reinforcing the basic structure of the traditional *res publica*, understood as a political system built around the good functioning of a strong senate, to which the people have to remain subordinate at all times. Although unusually inclined to consider socio-economic factors as responsible for the decline of the commonwealth, the author of the *Second Letter to Caesar* adopts an argument proper to this intellectual tradition: a commonwealth whose constitutional arrangements are centred on a strong senate will be able to maintain its own *imperium* and *libertas*. 'I have learned by abundant reading and instruction that all kingdoms (*regna*), as well as states (*civitates*) and nations (*nationes*), have enjoyed prosperity and power for so long a time as wise counsel (*vera consilia*) has reigned among them; but just so soon as this was vitiated by favour, fear or pleasure, their strength rapidly waned, then their supremacy was wrested from them, and finally they were reduced to slavery (*post paulo imminutae opes, deinde ademptum imperium, postremo servitus imposita est*).'¹¹⁹

In sustaining the central role of the senate in the government of the commonwealth, the author refers to the metaphor of the body politic, which very much recalls, although with some variation, Dionysius of Halicarnassus' version of the apologue of Menenius Agrippa: 'Since the commons (*plebs*) submit to the senate as the body does to the soul (*sicuti corpus animo oboedit*), and carry out its decrees, the fathers ought to be strong in counsel, but for the people cleverness is superfluous.'¹²⁰

Therefore, it comes as no surprise to find that Dionysius' picture does not differ much on this point from the other accounts, in discussing the 'constitution of Romulus', which he presents as a mixed constitution with powers distributed between the king, the senate and the people.

In outlining the tripartite arrangements of government's functions, Dionysius describes the king's prerogatives as including supremacy in

¹¹⁷ Cic. *Leg.* 3.28; *Sest.* 137. ¹¹⁸ Duplá, Fatas and Pina Polo 1994: 120–4. See below 112.

¹¹⁹ Sall. [*Ad Caes. Sen.*] 2.10.3; cf. 2.8 where the author praises Gaius Gracchus' reform on the so-called *centuria praerogativa* as a safeguard which, allowing each man to outdo his fellow in merit, will restrain the obstructing power of the riches to the proper functioning of the traditional *res publica*.

¹²⁰ *Ibid.* 2.10.6. For the metaphor of the body politic as soul and body rather than as belly and limbs see López Barja de Quiroga 2007c.

religious matters, guardianship of the laws and customs, and a general oversight in all cases of justice; the people's privileges as the choice of the magistrates and the ratification of laws; and the senate's role as 'to deliberate and give their votes concerning everything the king should refer to them, the decision of the majority to prevail. This also Romulus took over from the constitution of the Lacedaemonians; for their kings, too, did not have arbitrary power to do everything they wished, but the γερουσία exercised complete control of public affairs.'¹²¹ As clearly emphasised by the comparison with Sparta, in Dionysius' mixed constitution the focus of power resided in the senate, in whose hands lay the true control of the commonwealth, since it had 'to consider and take a vote on any proposal by the king' as well as 'to give its concurrence to any of the people's decision to give them effect'.¹²²

If Gabba is right in identifying Dionysius' source for the 'constitution of Romulus' as a late Republican pamphlet of the 70s, it would not be too far-fetched to attribute to this intellectual tradition, which assigned a prominent role to the senate in the working of a mixed constitution, the attestation reported in the *Rhetorica ad Herennium*.¹²³ Although the date of composition as well as its author are uncertain, it seems generally accepted that the work was composed in the 80s, or, at the latest, at the beginning of the 70s.¹²⁴ In the highly pro-senatorial political climate of the post-Sullan period, the author of the *Rhetorica ad Herennium* presents the figure of *distributio*, which 'by assigning each element his duty severally distinguishes a number of entities', by giving the following example: 'The senate's function is to assist the commonwealth with counsel (*senatus est officium consilio civitatem iuvare*); the magistrates' is to execute, by diligent activity, the senate's will (*senatus voluntatem*); the people's to choose and support by its votes the best measures and the most suitable men (*res optimas et homines idoneos . . . deligere et probare*).'¹²⁵

The predominance of the senate within the mixed constitution indicates where, according to these authors, the true power lay in the best form of government: the magistrates, who derived their power from the people, should accept the senate's authority and, conforming to its will, implement the policies it devised, whilst the people, recognised as the sovereign power

¹²¹ Dion. Hal. *Ant. Rom.* 2.14.2.

¹²² Carsana 1990: 35. The most perceptive analysis of Dionysius' work and his relation with Polybius is Gabba 1991: esp. 201–8.

¹²³ Ferrary 1982: 744–5.

¹²⁴ The date of 50 BC proposed by Douglas 1960 should be rejected. For the arguments see Calboli 1969: 12–17.

¹²⁵ Cic. *Rhet. Her.* 4.47.

from which any *potestas* derived, should ultimately entrust the administration of power and their interests to the best men.

A third claim advanced by these authors is that the mixed and balanced constitution is the best form of government to preserve political liberty as it assures full representation to all different social interests. Informed by a combination of distributive and corrective justice, it guarantees that all members of the community receive what it is their fair share of profit and, mindful of this, conduct their life in a state of contented satisfaction. In a commonwealth so organised, they claim, *concordia* reigns sovereign, and all members of the community universally recognise the common good and are prepared to strive together to achieve it.

As argued in Cicero's *de republica*, the structure and composition of the mixed and balanced constitution was of such a nature as not only to assure stability, but also embody true fairness.¹²⁶ This conception of justice was implemented through a combination of arithmetical and geometric equality, which, these authors maintain, found its concrete manifestation in the voting arrangements of the *comitia centuriata*. In this kind of assembly, no citizen was deprived of the right to vote; however, by virtue of this voting system's structure those with the greatest interest in the best possible administration of the commonwealth were guaranteed the greatest voting power.¹²⁷

It follows that, on the one hand, the mixed and balanced constitution, 'this moderate and blended form of government resulting from the combination of the three simple forms', guarantees 'a certain degree of equality which free men can hardly do without for very long (*aequabilitatem quandam qua carere diutius vix possunt liberi*)'.¹²⁸ On the other hand, however, it does not allow the implementation of that 'legal equality (*aequabilitas quidem iuris*) of which free people are so fond', as this kind of equality 'is really most inequitable. For when equal honour is given to the best and the worst – who both must exist in any population – then this very "fairness" is most unfair.'¹²⁹

¹²⁶ Cic. *Rep.* 1.43, 1.53, 1.69. On this point in regard to Cicero and Dionysius of Halicarnassus see Nicolet 1976.

¹²⁷ Cic. *Rep.* 2.40; Livy 1.43.1–12; Dion. Hal. *Ant. Rom.* 4.20.21.

¹²⁸ Cic. *Rep.* 1.69. On *aequabilitas* see Fantham 1973: 285–90, who interprets *aequitas* as equality that falls short of a higher concept of fairness. Dyck 1998: 565 underlines that what distinguishes *aequitas* from *aequabilitas* is not a higher or lower concept of fairness, but rather that the former is the description of a specific situation (*aequitas* [*sc. honorum*]), while the latter is a principle of governance. Contrast the commentary of Zetzel 1995: *ad loc.* Later references to *aequabilitas* in the *de republica* (1.69, 2.42, 2.43, 2.57, 2.62) clearly suggest the proportional equality of the mixed constitution.

¹²⁹ Cic. *Rep.* 1.53.

The mixed and balanced constitution, therefore, allows for the granting of a minimal amount of equality (indeed of a sort of equality), necessary to achieve a proper constitutional balance in which none of the constituent parts feels entirely neglected.¹³⁰ However, it also ensures that the distinctions of rank, the *gradus dignitatis*, are preserved and prevents that sort of equality which is the most inequitable of all from being implemented. This form of constitution thus ensures a minimum amount of equality among individuals to guarantee the people's liberty, and, combined with the notion of geometric equality, assigns it to each member of society according to their *dignitas*.

This combined notion of proportions, arithmetical and geometric, allows the tripartite mixed constitution to remain balanced and stable. Each member of society would firmly hold the conviction that they possess what they deserve, and thereby would not seek strife or revolution, but rather conduct their life in harmony (*concordia*): 'There is no reason for change when each citizen is firmly set in his own rank (*non est enim causa conversionis, ubi in suo quisque est gradu firmiter collocatus*) without the possibility of plunging and sinking.'¹³¹

In this intellectual tradition as developed in Rome, the notion of proportion as an ordering criterion of the just commonwealth and foundation of its stability and liberty finds its origins in Greek philosophical thinking. The notion of λογισμός (understood as mathematical calculation) as informing the organisation of the civic community is first attested in a fragment by Archytas, a Pythagorean thinker from Tarentum, who lived in the first half of the fourth century BC.

'Once calculation (λογισμός) was discovered,' says Archytas, 'it stopped discord (στάσις) and increased concord (ὁμόνοια). For people do not want more than their share, and equality (ἰσότης) exists, once this has come into being. For by means of calculation we will seek reconciliation in our dealings with others. Through this, then, the poor receive from the powerful, and the wealthy give to the needy, both in the confidence that they will have what is fair on account of this. It serves as a standard and a hindrance to the unjust.'¹³²

Archytas's extraordinary novelty lies in the emphasis on the role of λογισμός, in the mathematical sense of calculation, rather than rational

¹³⁰ Perelli 1990: 95 and Büchner 1984: 165 interpret it as referring to the balance of three equally powerful parts. I follow Fantham 1973: 287 in taking it to signify numerical equality. Asmis 2005: 402–3 takes it to be a hint at the notion resulting from numerical equality mixed with equality of merit.

¹³¹ Cic. *Rep.* 1.69.

¹³² Archytas fr. 3.6–11 Huffman (Stobaeus 4.1.139) = Iamblichus, *On General Mathematical Science* II (44.10–17 Festa) (trans. by Huffman 2005).

thought, as an indispensable tool for the organisation of men's life in a city-state. In his opinion, it is calculation and application of proportion which will prevent civil strife and will establish concord by ensuring equality amongst citizens in place of *πλεονεξία*, the desire to possess more than others.

The crucial function of *λογισμός* resides not so much in showing to the wealthy that they should donate to the needy and to the poor that they should receive from the rich, but rather in its power to produce an agreement amongst all individuals in the *polis* in their dealings with one another. Its power lies in the clarity of calculation that has the potential to convince people that what they have is what is fair. When adopted in addressing political issues, an appreciation of numerical calculation and the use of proportion will encourage people to make connections between different values in society and the ways in which they are connected. These values exist in proportion to other values and, if 'the members of the community can see the coherence of the ways in which the values are connected, then concord can be achieved and discord banished'.¹³³

In developing his theory of justice as the foundation of the best form of government – a *politeia* resulting from the perfect fusion between two constitutions (and their corresponding notions of equality) – Aristotle builds on Archytas' notion of calculation as applied to political issues. By doing so, he provides an excellent example of how different sorts of mathematical proportion might be adopted in the just ordering of the commonwealth.

Aristotle had not only read Archytas' works carefully, but also composed three books on him.¹³⁴ Although in many respects dissenting from some of the most fundamental tenets of Archytas' thought, Aristotle appears to be building on Archytas' notion of calculation and its political applications when he identifies two kinds of special justice.¹³⁵

In his account of this virtue, Aristotle categorises two types of special justice, distributive justice and corrective justice, which are identified by a mathematical proportion.¹³⁶ Distributive justice, favoured by the aristocrats, is the equal according to the geometric proportion and corrective justice, favoured by the democrats, is the equal according to the arithmetic

¹³³ Huffman 2005: 206.

¹³⁴ Huffman 2005: 579–94 collects and discusses all the testimonia relevant to Aristotle's treatises on Archytas and the Pythagoreans.

¹³⁵ Although Aristotle does not mention Archytas, he states that political science cannot be equated with the science of calculation (*Eth. Nic.* 1.3.1094b12ff.) and emphasises that political concord is very distinct in nature from agreement in science, as shown in the case of astronomy (*Eth. Nic.* 9.6.1167a24).

¹³⁶ *Ar. Eth. Nic.* 5.2.1130b30.

proportion.¹³⁷ 'All men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth) . . . For proportion is equality of ratios . . . Mathematicians call this kind of proportion geometrical; for it is in geometrical proportion that it follows that the whole is to the whole as either part is to the corresponding part . . . This, then, is what the just is – the proportional; the unjust is what violates the proportion.'¹³⁸

Within the political sphere distributive justice manifests itself in proportionate equality, that is an equality based on the constant relation between persons and things. As Aristotle states in his *Politics*, all forms of government are based on the 'acknowledgment of justice and proportionate equality'. However, each kind of constitution privileges only one criterion as the determining factor in relations between men and abusively extends it to other domains. 'Democracy, for example, arises out of the notion that those who are equal in any respect are equal in all respects; because men are equally free, they claim to be absolutely equal. Oligarchy is based on the notion that those who are unequal in one respect are in all respects unequal; being unequal, that is, in property, they suppose themselves to be unequal absolutely. The democrats think that as they are equal they ought to be equal in all things; while the oligarchs, under the idea that they are unequal, claim too much, which is one form of inequality. All these forms of government have a kind of justice, but, tried by an absolute standard, they are faulty.'¹³⁹

For Aristotle, therefore, the best possible, even if not ideal, constitution, which he calls *politeia*, is a mixed form of government, which results from the fusion of two kinds of government, democracy and oligarchy, and of their respective notions of equality, arithmetic (or numerical) equality and geometric (or proportional) equality. Arithmetic equality is 'equality in number or size, the second quality of ratios. For example, the excess of three over two is numerically equal to the excess of two over one; whereas four exceeds two in the same ratio in which two exceeds one, for two is the same part of four that one is of two, namely, the half. As I was saying before, men agree that justice in the abstract is proportion, but they

¹³⁷ Ar. *Eth. Nic.* 5.3.1131a29ff., 5.4.1131b32ff.

¹³⁸ Ar. *Eth. Nic.* 5.3.1131a–b.

¹³⁹ Ar. *Pol.* 5.1301a26–b4. There are numerous references to the mathematical apparatus as foundation of justice: Ar. *Eth. Nic.* 5.1131b13–18, 5.1131a10–b24, 8.1158b27–33; *Eth. Eud.* 7.1238b19–21, 7.1241b33–41, 1242b11–22; *Mag. Mor.* 1.1193b19–1194a26. As reference to forms of government Ar. *Pol.* 6.1318a3–8, 6.1317b2–10. Interesting discussions in Nicolet 1976: 127–8, Harvey 1965 and more recently Miller 1995.

differ in that some think that if they are equal in any respect they are equal absolutely, others that if they are unequal in any respect they should be unequal in all. Hence there are two principal forms of government, democracy and oligarchy; for good birth and virtue are rare, but wealth and numbers are more common. In what city shall we find a hundred persons of good birth and of virtue? Whereas the rich everywhere abound. That a state should be ordered, simply and wholly, according to either kind of equality, is not a good thing; the proof is the fact that such forms of government never last. They are originally based on a mistake, and, as they begin badly, cannot fail to end badly. The inference is that both kinds of equality should be employed; numerical in some cases, and proportionate in others.¹⁴⁰

It follows that Aristotle's best constitution is founded upon two forms of government: first, democracy, where everybody, being equally free, is correspondingly a member of the citizenry (however different in wealth); second, oligarchy, where honours and offices are reserved for the wealthiest and where, being not all equally deserving, the most worthy are chosen thanks of the vigilance of the whole.¹⁴¹ The application of λογισμός favours the formulation of two conceptions of justice and contributes to the abolition of στάσις.

The notion that for a commonwealth to be effective in its administration of power both arithmetical and geometric proportion should be applied is also found in the writing of Plato, Archytas' dear friend, whom Archytas helped during his troubles with Dionysius of Syracuse. In the *Laws*, Plato compares the human idea of equality, exemplified in the democratic practice of lot drawing, and based on the assumption that each man should be regarded as having the same value as the next, to the divine and ideal notion of equality based on virtue and education.¹⁴² 'There are two equalities,' he states, 'which are called by the same name, but are in reality in many ways almost the opposite of one another; one of them may be introduced without difficulty by any state or any legislator in the distribution of honours; namely, that of measure, weight, and number, which he ensures by lot. But there is another equality, of a better and higher kind, which is not so easily recognised. This is the judgment of Zeus; amongst men it avails but

¹⁴⁰ Ar. *Pol.* 5.1301b29–1302a8. ¹⁴¹ Ar. *Pol.* 3.1280a25–31, 4.1294a36–b18, 4.1318b25–6.

¹⁴² Isocr. *Areop.* 21–2 on the association of arithmetic equality with the democratic use of the lot. Cf. Isocr. *Nic.* 14–16. For a discussion on the relation between Plato and Isocrates see Harvey 1965: 112–13. It is to be observed that 'the lot in practice is part of an anti-democratic campaign since Athenian generals were elected so that experienced men could lead the army, there were property qualifications for the post of *ταμίης*, so that if he took money it could be recovered' and so forth (*ibid.*: 127).

little; that little, however, is the source of the greatest good to individual and states. For it gives to the greater more and to the inferior less, and in proportion to the nature of each; and above all, greater honour always to the greater virtue, and to the less less; and to either in proportion to their respective measure of virtue and education. And this is justice, and is ever the true principle of states, at which we ought to aim.¹⁴³

Contrary to Aristotle, Plato does not seem to consider the recourse to the arithmetical proportion as an almost neutral means to achieve the best possible form of commonwealth, but rather appears to regard it as a necessary concession to a democratic principle, unavoidable to prevent political instability, but which should be accommodated as little as possible.¹⁴⁴

As Plato had stated in *Gorgias*, he believes that, in order to combat greed (πλεονεξία), a good constitution should be structured on geometric equality, perhaps to be understood here as a more generic application of mathematical proportion rather than strictly geometric equality.¹⁴⁵ However, in the *Republic* and the *Laws* Plato ascribes the idea of arithmetical and geometric equality to the σοφοί (the wise), that is to say the Pythagoreans, and identifies the closest historical approximation to the ideal of geometric equality in the Lacedaemonian constitution.¹⁴⁶

Pythagorean influence on Plato's thought was recognised by Aristotle's pupil, Dicaearchus. According to Plutarch, he claimed that Plato was a combination of Socrates with Pythagoras and Lycurgus. The reason for this interpretation, Plutarch explains, was that Lycurgus, like Plato (or rather like the Pythagoreans), preferred geometric proportion to the arithmetic equality of democracy and 'banished numeric proportion from Sparta for being democratic and populist, and introduced the geometric proportion that suits a moderate oligarchy and constitutional monarchy. For the former distributes what is equal numerically, but the latter distributes rationally according to merit: instead of mixing everything together, it provides a clear discrimination between the helpful and the troublesome people, using no balances or lotteries but the difference between virtue and vice, so that everyone receives what suits them.'¹⁴⁷

¹⁴³ Pl. *Leg.* 6.757b–c.

¹⁴⁴ Pl. *Leg.* 6.757e–758a. For the similarities on this point between Plato and Cicero see Ferrary 1984.

¹⁴⁵ Pl. *Grg.* 508a.

¹⁴⁶ Pl. *Rep.* 8.544–50; *Leg.* 3 691c–692c. Huffman 2002 claims that Plato in the *Gorgias* is, at least in part, thinking of Archytas. See Harvey 1965: 107–19.

¹⁴⁷ Plut. *Quaest. Conv.* 8.2.719a–b, with Osann's emendation. Jaeger (1960: 347–93, esp. 389–91) argues that Dicaearchus mentioned all three figures in relation to Plato 'as Plutarch would have cited him only if he went beyond the standard view'.

As mentioned above, Dicaearchus was a strong admirer of Sparta. Author of the Λακεδαιμονίων Πολιτεία, he definitely discussed the Spartan custom of common meals in the Τριπολιτικός (if this is indeed a different work on the 'Lacedaemonian Constitution' to that celebrated in Sparta itself), Dicaearchus, alongside his friend Aristoxenus, should be held responsible for a more definite association of Pythagoreanism with Laconism in the political sphere.¹⁴⁸

Since, according to one source (Plutarch), he was accountable for the explicit connection between the Spartan constitution and the Pythagorean notion of geometric equality, and, according to another (Athaeneus), was an admirer of a tripartite form of constitution (composed of monarchy, aristocracy and democracy), as most likely embodied in Sparta, Dicaearchus was perhaps the first thinker to associate the applicability of mathematical proportion to the arrangements of the tripartite mixed constitution. Given his explicit reference to the φιδίτις (common mess), universally interpreted as one of the democratic traits of Spartan life,¹⁴⁹ Dicaearchus might have been the first thinker to state that the best form of government was the tripartite mixed constitution that combined both Pythagorean notions of geometric and arithmetic proportions as historically exemplified in Sparta.

If, for Plato, Sparta's constitution exemplified the mean between monarchy and democracy, which he related to the ideal of arithmetical and geometric proportion, for Aristotle Sparta's form of government was rather ambiguous.¹⁵⁰ In Book 4 Sparta's constitution almost embodies the perfect form of government, the *politeia*, and represents the best fusion between democracy and oligarchy and their related principles of equality, whilst in Book 2 it seems to take the form of a tripartite mixed constitution with almost preponderant democratic traits, for which it is heavily criticised.

However, with Dicaearchus, Sparta's constitution comes to be established as the example of the best form of government, resulting from the mixture of the three simple forms (monarchy, aristocracy and democracy), and associated with the Pythagorean notion of

¹⁴⁸ Dicaearchus might have recounted the story that Pythagoras had visited Crete and Sparta to study their laws Cf. fr. 33–5W = fr. 40–41A M. Rawson 1991a: 83.

¹⁴⁹ Ar. Pol. 2.1265b41; cf. 1271a32–8. See also Plut. Lyc. 10–12 on the democratic traits of the φιδίτις.

¹⁵⁰ Pl. Rep. 8.544–50; Leg. 547c–d, 550b6, 558c, 3.691–3, 6.757. The contradiction between Plato's description of Sparta as a tripartite mixed constitution and as a result of the fusion between these two principles is only apparent. Plato is not referring here to two segments of society, interest groups or socio-political institutions, but rather to the authority exercised by the ruler and attitude of the rulers and ruled towards each other and the wider community. See Hahm 2009: 181–5; cf. Ar. Pol. 4.9.1294a36–61 and 1265b31–1266a1. For a useful account on the topic see Rawson 1991a: 72–9.

mathematical proportions, arithmetical and geometric, both embodied in the Spartan constitution.

The idea of adopting mathematical calculation to determine the best possible political arrangement was so successful that it also features in the spurious *On Law and Justice*.¹⁵¹ Most likely composed in the Hellenistic period, this text connects, along similar lines as Archytas, mathematical means with constitutions and identifies the best form of government in a mixed quadripartite constitution embodied by Sparta.

In this work, the unknown author asserts that there are three kinds of distribution, governed by arithmetic, harmonic and geometric proportions, which can be observed in both constitutions and households. In a unique system of correspondence, the Pseudo-Archytas associates the geometric mean with democracy, the harmonic mean with aristocracy and the arithmetic mean with oligarchy. These rather odd associations, to Aalder a clear sign of the clumsy attempts of a forger, are closely connected to fragment 2 of Archytas where the same three means are defined and evaluated in terms of whether the ratios of the larger terms are greater than, smaller than or equal to the ratios of the smaller terms. In the author's opinion, the most just is the harmonic mean, 'the proportion which attributes the greatest results to the greatest terms, and the smallest to the smallest'.¹⁵² He then states that the best form of government is an eccentric quadripartite mixed constitution, of which Sparta offers an example.¹⁵³ Next to the kings representing monarchs and the γέροντες (the Elders) representing aristocracy, in a rather unusual combination, Pseudo-Archytas describes the ἑφοροί embodying oligarchy, and the commanders of the bodyguard and the κόροι (the young men in their rank, one must assume) embodying democracy.¹⁵⁴ In a manner reminiscent of Polybius, these powers are depicted as counterbalancing each other, each ruling and being ruled, and held in check by the intervention of one another.¹⁵⁵

Most probably composed between the third and the second centuries BC, *On Law and Justice* attests the presence of an intellectual tradition which identified the notion of mathematical proportions as the means to

¹⁵¹ For an excellent recapitulation of the arguments in favour of and against the authenticity of this text see Huffman 2005: 599–606. See also Thesleff 1965: 33.1–35.30, according to whom the text should be dated to the fourth century. I am persuaded by the arguments of Aalders 1968: 17–21, who dates the text to the third or second century BC.

¹⁵² Ps.-Archytas 33.14.

¹⁵³ See Centrone 2000: 487–505 on the relation between the mixed constitution and the criteria of justice in the text.

¹⁵⁴ The idea that the κόροι assume a middle position between the three other powers (34.25) has close parallels in Ar. *Pol.* 4.1295b2ff. See Aalders 1975: 30–1.

¹⁵⁵ Aalders 1968: 95–7.

establish the perfect constitution, conceived, in this case, as a mixture of four simple forms of government. This powerful idea, first elaborated by Archytas, was so strongly associated with his name that this work, which contains an extensive, although somewhat confused, version of it, came to be attributed to him.¹⁵⁶

The connection of Archytas' name with the applicability of mathematical proportions to politics assumes great relevance when associated with the renaissance of interest in Archytas' work amongst the Romans of the first century BC. Alongside a renewed attention to Dicaearchus, Roman thinkers such as Cicero and Varro displayed a considerable knowledge of, and admiration for, Archytas' work.¹⁵⁷

Acclaimed, in the first century, as an astronomer, cosmologist and mathematician, Archytas is represented by Cicero as a man who is governed by reason, who does not act in anger and does not indulge in bodily pleasure. Nor was Cicero the only author to mention Archytas, as his life and thought might have been also well known through the *Life of Archytas* by Aristoxenus.¹⁵⁸ Demonstrating the significance that was attached to Aristoxenus' work, Suetonius, the famous biographer of the second century AD, considers Aristoxenus the most important of the Greek biographers. Cicero, who certainly knew of him (eight of Aristoxenus' fragments are found in Cicero's work), had, most likely, also read his *Life of Archytas*, although there is no direct evidence to prove this.¹⁵⁹

In the first century BC, this renaissance of interest in Archytas and, more in general, in Pythagorean philosophy, may well represent a conscious attempt by some Romans to claim Pythagoreanism as a native Italian philosophy.¹⁶⁰ Cicero himself, who expresses on more than one occasion his admiration for Pythagoras and the Pythagoreans, assigns them a special prominence by virtue of their *sapientia constituendae civitatis*, the political wisdom placed at the foundation of the community's life, and identifies numerous elements of Roman institutions as Pythagorean in origins and inspiration.¹⁶¹

¹⁵⁶ Thesleff 1965: 33.1–36.11 and Stobaeus 4.1.132.

¹⁵⁷ For Varro see B8 in Huffman 2005: 281; for Cicero, Cic. *Amic.* 13; *Tusc.* 4.2–3.

¹⁵⁸ E.g. *Tusc.* 4.78.

¹⁵⁹ See Huffman 2005: 21, 24, 293–6. *Contra* Powell 1995: 11ff. Cf. Cic. *Att.* 13.32, where Cicero makes explicit reference to Dicaearchus' *Letter to Aristoxenus*.

¹⁶⁰ Burkert 1961.

¹⁶¹ On Cicero's admiration for Pythagoreanism see, for example, Cic. *De or.* 3.56, 3.139; *Rep.* 1.16; *Leg.* 2.26; *Tusc.* 1.38–9, 3.36–7, 4.2–4, 4.10, 5.8–10, 5.30, 5.66; *Sen.* 23, 33, 78; *Off.* 1.155. On their *sapientia constituendae civitatis* see *De or.* 2.154 and *Tusc.* 4.2–4.

If, as Cicero claims, during the course of the Republic Pythagoreanism had fallen out of favour amongst Roman intellectuals, and in Roman society more generally, it was undeniable that this philosophical doctrine saw a new flourishing at Rome during the first century BC.¹⁶² Varro was initiated into neo-Pythagoreanism, Nigidius Figulus, the most distinguished representative of the neo-Pythagoreans of the time, was described by Cicero as *unus omnium doctissimus et sanctissimus*, and Cicero's *de republica* (especially Book 6) was influenced by the doctrine's cosmological ideals.¹⁶³

Nor was this a completely new phenomenon in the first century BC. Already in fourth and third centuries BC Pythagoreanism had assumed a significant role in the ideological and cultural substratum of the Roman world.¹⁶⁴ Around this time, not only did the Aemilii reconstruct their genealogy tracing their origin from Mamercus, the son of Pythagoras,¹⁶⁵ and the tradition of the king Numa as Pythagoras' disciple was elaborated,¹⁶⁶ but also a statue of Pythagoras was erected in the Forum *in cornibus comitia* next to that of Alcibiades, to represent respectively the wisest and the bravest of the Greeks.¹⁶⁷ The influence of Pythagorean philosophy seemed so ubiquitous in Rome at the time that Cicero also considered Appius Claudius Caecus' *Carmen*, much praised by Panaetius, to be of Pythagorean inspiration.¹⁶⁸

This tradition of thought, which had preserved the Pythagorean notion of λογισμός as applied to constitutional arrangements by Plato, Aristotle and ultimately Dicaearchus, provided the authors of the first century BC with the conceptual categories to describe their political system. By supplying these notions to talk about their political institutions, this intellectual tradition provided them with the key conceptual categories which allowed them to think about and to justify the political arrangements they privileged.¹⁶⁹

In the *de republica*, Cicero could describe the Servian system, the cornerstone of Scipio's actualised ideal commonwealth, as structured in such

¹⁶² Cic. *Tim.* 1.

¹⁶³ On Cicero and Nigidius Cic. *Fam.* 4.13.3. See Ferrero 1955: 287–310; Della Casa 1962: esp. 22–33 and 131–5; Traglia 1977: 84–9; Petit 1988: 23–32. More generally on Pythagoreanism at Rome see Ternes 1998; Storch Marino 1999 and 2000.

¹⁶⁴ See Humm 1996: 339–53 and 1997: 25–42.

¹⁶⁵ Festus 22.91; Plut. *Aem.* 2.1.

¹⁶⁶ Possibly first created by Aristoxenus of Tarentum in the late fourth or early third century, the idea of Numa as disciple of Pythagoras was rejected on chronological grounds by Cicero (*Rep.* 2.28–9; *De or.* 2.154; *Tusc.* 4.3) as well as later by Livy (1.18.1–3) and Dionysius of Halicarnassus (*Ant. Rom.* 2.59.1–2).

¹⁶⁷ Plin. *HN* 34.26: Sulla destroyed the statues when he built his curia.

¹⁶⁸ Cic. *Tusc.* 4.4. See Humm 2000: 447–62. and Storch Marino 2000: 361.

¹⁶⁹ On the relation between Plato and Pythagorean thinking see Ferrero 1955: 63–78; Pagnotta 2007: 114–15. For Dicaearchus' dependence on Plato in his anthropological and political theory, Bury 1909: 187 and Sinclair 1951: 251.

a way to assure ‘that the votes belonged, not to the majority but to the rich, and he made certain a principle which ought always to be adhered to in the commonwealth – that the greatest number did not have the greatest power’. However, the system also guaranteed that ‘a large majority of the citizens would neither be excluded from voting, which would be arrogant, nor be given too much power, which would be dangerous . . . thus, while no one was deprived of the right to vote, the people who had the most power in the voting were those with the greatest interest in preserving the commonwealth in the best possible condition.’¹⁷⁰

Thus, Scipio’s ideal form of government, the mixed and balanced constitution, was informed by both corrective and distributive justice: arithmetic proportion, according to which everyone was equally entitled to vote, and thus shared equally the most basic political right of free men, and geometric proportion, according to which those who had more at stake in the commonwealth, those who were the wealthiest, held more power.¹⁷¹

Livy and Dionysius of Halicarnassus, the other two literary sources that describe the centuriate system, offer the same reading and justification of the principles at the foundation of the Servian organisation, despite a difference in emphasis from Cicero. Whilst Livy asserts that Servius modified Romulus’ constitution ‘in which all alike possessed the same weight and enjoyed the same rights’ and ‘introduced a graduation; so that whilst no one was ostensibly deprived of his vote, all the voting power was in the hands of the principal men of the commonwealth’,¹⁷² Dionysius explains that ‘Tullius made none of these regulations without reason, but from the conviction that all men look upon their possessions as the prizes at stake in war and that it is for the sake of retaining these that they all endure its hardships; he thought it right, therefore, that those who had greater prizes at stake should suffer greater hardships, both with their persons and with their possessions, that those who had less at stake should be less burdened in respect to both, and that those who had no loss to fear should endure no hardships, but be exempt from taxes by reason of their poverty and from military service because they paid no tax.’¹⁷³

If, in the first century BC, authors interpreted the principles informing the centuriate system at the moment of its traditional creation along these lines, the contemporary vitality and strength of these ideas are attested in the *Second Letter to Caesar*. Although the work’s authorship is still a

¹⁷⁰ Cic. *Rep.* 2.39–40. See Nicholls 1964: 102–5 on the timocratic nature of the *comitia centuriata* and its place in the mixed constitution.

¹⁷¹ Cf. Cic. *Rep.* 1.69. Asmis 2004: 586 underlines the Aristotelian origins of the notion. Nicolet 1970a and Ferrary 1984 emphasise the Platonic influence on Cicero.

¹⁷² Livy 1.43.10–11. ¹⁷³ Dion. Hal. *Ant. Rom.* 4.19.3.

rather controversial issue, as mentioned above most recent scholarship convincingly dates the text to the mid first century BC.¹⁷⁴ The author of this work proposes a reform of the commonwealth that, at first sight, may appear to give expression to a form of ‘*popularis*’ ideology, as it focuses on a democratising reform of the *comitia centuriata* and the introduction of the secret vote in the senate, and presents a general consideration and awareness of socio-economic issues. However, the proposed reforms are intended to reinforce the basic structures of the traditional *res publica*, understood as the senate and the popular assemblies, in which the people continue to be conceived as subordinate to the senate at all times.

The text proposes two major reforms concerning the senate, an increase in the number of members and the introduction of the secret ballot, the aim of which was to re-establish the senate’s former glories and free it from the grip of a *factio*. The senate’s supremacy is justified with an argument that closely resembles those adopted in explaining the Servian system: ‘Whenever a man has in his own state a higher and more conspicuous position than his fellows, he takes a great interest in the welfare of his country (*magnam curam rei publicae*). For to other citizens the safety of the commonwealth merely assures their personal liberty; but those who by their talents have won riches, respect and renown are filled with manifold anxiety and trouble if the commonwealth begins to decline and totter ever so little. He flies to the defence of his repute, or his freedom, or his property; he is to be seen everywhere and makes haste; the more flourishing he was in prosperity, the more cruelly is he harried and worried in adversity.’¹⁷⁵

Although any direct reference to Archytas, Dicaearchus or even Plato and Aristotle is absent in the texts of this intellectual tradition, these authors all share a further claim. They all agree that the application of the Pythagorean λογισμός to constitutional arrangements may succeed in removing the cause of στάσις, that is πλεονεξία (‘wanting more than one’s share’) and in creating *concordia*, which, as Cicero makes Scipio say, cannot exist without justice.¹⁷⁶ The application of the mathematical proportion to the institutional arrangements not only establishes a just form of government, but also ensures that its members are content with

¹⁷⁴ Syme 1964 has been the most vehement detractor of the authenticity of the text against whom, more recently, Duplá, Fatas and Pina Polo 1994 and Zecchini 1997: 59–60.

¹⁷⁵ Sall. [*Ad Caes Sen.*] 2.10.5. Cf. Cic. *Mur.* 41.

¹⁷⁶ The role played by greed in politics is a *topos* of classical Greek thinking. See, for example, Thucydides’ famous account of the revolution in Corcyra (3.82.3): ‘the cause of all these things was desire for power on account of greed (πλεονεξία) and personal ambition’ (3.82.3). See the parallel of Sall. *Cat.* 38.3. In both passages, πλεονεξία seems to be ascribed to both factions (the oligarchic and democratic one) involved.

their share, which they regard as just and fair. It also guarantees that, recognising themselves as part of the community, all its constituents work in harmony to achieve what they recognise to be the common good. 'As in the music of lyres and flutes and of course in the voices of singers a certain harmony must be preserved among different sounds (*concentus est quidam tenendus ex distinctis sonis*), harmony that if altered or discordant trained ears would find intolerable and is made pleasing and concordant by the proportionate arrangement of very different voices (*isque concentus ex dissimillarum vocum moderatione concors tamen efficitur et congruens*), so too the commonwealth is made harmonious by agreement among very different people brought about by a reasoned balance of the upper, the lower, and the intervening orders, just as if they were musical tones (*ex summis et infimis et mediis interiectis ordinibus ut sonis moderata ratione civitas consensu dissimillorum concinit*). What musicians call harmony in song is concord in a commonwealth, the strongest and best bond of safety in any republic; and such concord can never exist without the aid of justice.¹⁷⁷ Building on Plato's musical analogy and the Pythagoreans' notion of proportionality, Cicero explains political consensus as harmony amongst different social groups (*ordines*).¹⁷⁸ Just as harmony is produced in music by a proportionate blending of high, middle and low notes, which are very dissimilar from one another, so concord is produced in the commonwealth by the common agreement (*consensus*) brought about by a proportionate blending of dissimilar social groups. Unlike in Plato's state, in which the workers, the soldiers and the philosophers-kings, (that is the lowest, the middle and the highest part), agree on who should rule and who should be ruled, Cicero emphasises that the three social groups into which he divides society (distinct from the Platonic political units) agree to work in cooperation with one another.

As the members of the community recognise their position in society as fair and appropriate, part of a just commonwealth, and, according to Cicero, receive support from the statesmen by way of example, they do not perform any act of prevarication over others, but rather create that social harmony which underpins the political structure of the mixed and balanced constitution, and as such preserves the commonwealth's liberty.¹⁷⁹

¹⁷⁷ Cic. *Rep.* 2.69.

¹⁷⁸ Pl. *Rep.* 4.431e–432a; cf. 3.398e–400d, 4.443d–e. On the Pythagorean influence on this Ciceronian passage see Delatte 1922: 63ff. and 121ff. and Pagnotta 2007: 117–19.

¹⁷⁹ Cic. *Rep.* 2.69. Ferrary 1995: 64–5 convincingly explains the image of the mirror, but emphasises the role of the *prudens* in joining all the different elements together so that harmony and *concordia* may be generated out of diversity. Cf. Cic. *Fam.* 1.9.12, where Cicero attributes to Plato a passage from

The importance of socio-political harmony and equilibrium to the achievement of the liberty of the commonwealth is also advanced in Dionysius of Halicarnassus' historical account. In the speech he attributes to Manius Valerius, the true *auctor concordiae* in Dionysius' history, the Roman politician, addressing the senate in the midst of the plebeian turmoil of 494 BC, 'censured those senators who would not permit the commonwealth to remain united, but sought to divide the plebeians from the patricians . . . and commended those who held that there was but one advantage to be considered, and regarded everything else as secondary to harmony (ὁμόνοια)'.¹⁸⁰ In his opinion, this highest political value of *concordia* could only be achieved through a constitutional system that mixed the simple forms of government. 'If anything is going to be the means of preserving this commonwealth and insuring that she shall never be deprived of her liberty or her power, but shall ever continue to be united and harmonious in all respects, the most effective instrument will be the populace if taken as partners in the administration of affairs; and what will benefit us above everything will be, not to have a simple and unmixed form of government administering the state, whether monarchy, oligarchy, or democracy, but a constitution combined out of all of these.'¹⁸¹

As Dionysius emphasises, in order to maintain *concordia* and the liberty of the commonwealth, this perfect mixed and balanced constitution requires the inclusion of the people in the administration of public affairs as well as the recognition of the senate's political centrality, to which even the regal power is subjected.¹⁸²

However, as clearly transpires from Dionysius' text, in order for this perfect constitution to work and its harmony to be preserved, it is necessary that the 'hierarchical blending of wills' within the commonwealth, as advocated by Scipio in Cicero's *de republica*, is truly realised and, with it, also the resulting consensus amongst the citizen-body.¹⁸³ In a speech that Dionysius himself states to be 'quoted in all ancient histories', Mene-nius Agrippa, in the very famous apologue 'composed after the manner of Aesop', is reported to have compared the commonwealth to the human

Xenophon's *Cyropaedia* (8.8.5) which underlines the tendency of the citizens of the commonwealth to resemble their leaders. See also Asmis 2005: 405–8 and Pagnotta 2007: 118.

¹⁸⁰ Dion. Hal. *Ant. Rom.* 7.54.1. On the speech see Noë 1979: 105ff. and Carsana 1990. Meyer 1924: 1360 attributes the special role assigned to Manius Valerius to Dionysius' dependence on Valerius Antias. Cf. also Dion. Hal. *Ant. Rom.* 6.43.4 and Cic. *Brut.* 54.

¹⁸¹ Dion. Hal. *Ant. Rom.* 7.55.2.

¹⁸² Dion. Hal. *Ant. Rom.* 7.55.5; cf. 2.14. See Gabba 1991 and Carsana 1990: 35.

¹⁸³ On the role that Dionysius reserves to the dictator in restoring the mixed and balanced constitution see Gabba 1991: 144ff. For the quoted expression Asmis 2005: 406.

body.¹⁸⁴ As the latter ‘consists of many parts and no one of their parts either has the same function or performs the same service as the others’, but all make essential contributions to the healthy survival of the body, so a commonwealth ‘is composed of many classes of people not at all resembling one another, every one of which contributes some particular service to the common good, just as its members do to the body. For some cultivate the fields, some fight against the enemy in defence of those fields, others carry on much useful trade by sea, and still others ply the necessary crafts.’ All these services are of vital importance for the working of the commonwealth. However, as in the case of the human body, if the parts decide no longer to perform their duties, in a few days the whole body will suffer starvation, so, in the case of the commonwealth if ‘all these different classes of people should rise against the senate, which is composed of the best men, and say, “As for you, senate, what good do you do us, and for what reason do you presume to rule over others? Not a thing can you name. Well then, shall we not now at last free ourselves from this tyranny of yours and live without a leader?” If, I say, they should take this resolution and quit their usual employments, what will hinder this miserable commonwealth from perishing miserably by famine, war and every other evil?’¹⁸⁵

The remedy that Menenius Agrippa proposes is the accomplishment of the common advantage by the cooperation of all parts of the commonwealth, which establishes socio-political harmony, based on the predication of the subordinate popular participation in political life and the pre-eminent role of the senate in the administration of public affairs.¹⁸⁶ However, this mutual relation between the masses and the senate, where, in Agrippa’s words, ‘the ignorant masses will never cease to need prudent leadership, and the senate, which has the capacity for leadership, will always require a submissive multitude’, is based on the understanding that the commonwealth is conceived as a common enterprise to which everyone contributes, and the benefits of which are distributed accordingly and in a manner that is beneficial to everyone.¹⁸⁷ ‘Just as in our bodies the belly thus evilly reviled by the multitude nourishes the body even while it is itself nourished, and preserves it while it is preserved itself, and is a kind of feast, as it were, provided by joint contributions, which as a result of

¹⁸⁴ Dion. Hal. *Ant. Rom.* 6.83.2–86. On the Greek origin of the apologue and its introduction in Rome, Nestle 1927: 350–60; Momigliano 1942; and most recently, the excellent treatment by López Barja de Quiroga 2007c who dates the introduction of this fable in Roman culture to the second century BC. For the fortune of the apologue see, alongside Dionysius, Livy 2.32; Plut. *Cor.* 6; Dio Cass. 4.9–11; *de viris illustribus* 18; Zonaras 7.14; and the translation of the fable in Christian terms in 1 Corinth. xii.12–17.

¹⁸⁵ Dion. Hal. *Ant. Rom.* 6.86.

¹⁸⁶ Momigliano 1942: 117–19.

¹⁸⁷ Dion. Hal. *Ant. Rom.* 6.85.

the exchange duly distributes that which is beneficial to each and all, so in commonwealths the senate, which administers the affairs of the public and provides what is expedient for everyone, preserves, guards, and corrects all things.¹⁸⁸

The same episode is narrated by Livy: Menenius Agrippa, in his attempt to reconcile the plebs with the *patres*, talks about the conspiracy of the body parts against the belly according to which 'the hands should carry no food to the mouth, nor the mouth accept anything that was given it, nor the teeth grind up what they received'.¹⁸⁹ Building on the same metaphor of the body politic, so pervasive within Roman political discourse, Livy too underlines the importance of co-operation within the civic body.¹⁹⁰ This cooperation is based on an agreed consensus amongst its members, which requires, on the one hand, the granting of certain powers to the people, and, on the other, the acceptance of the leadership of the senate and its role in redistributing resources.

Thus, within the political and institutional arrangements favoured by this tradition of thought, not only are all members of the civic community satisfied that they possess what is their due, but they also feel part of the community in which they have their place, and thus act in harmony for the pursuit of the common good.

THE LIBERTY OF THE COMMONWEALTH: THE 'POPULARIS' TRADITION

The second major strand of Republican thought may be identified under the label of '*popularis*' tradition. The term *popularis* designates an intellectual tradition that, despite being attested only in a fragmentary form, displays a significant homogeneity on questions regarding fundamental evaluative terms such as liberty, justice and sovereignty.

As mentioned above, nourished by Greek philosophy, in particular by certain Stoic tenets, this tradition of thought should not be confused or identified with any specific philosophical doctrine. Rather, it was a style of political reasoning which, informed by Greek thinking, yielded a specific set of referents for essential political values. These, in turn, provided Roman politicians with the conceptual categories to analyse political issues and

¹⁸⁸ Dion. Hal. *Ant. Rom.* 6.86.5. ¹⁸⁹ Livy 2.32.10.

¹⁹⁰ See López Barja de Quiroga 2007c: 118–26. on Livy's use of the metaphor and, more in general, on the organic conception of the commonwealth in Greek and Roman thought. The *locus classicus* is Ar. *Pol.* 2.1253a15ff.

justify their courses of action, thereby offering them the intellectual tools to read and think about politics in those terms.

Politicians' recourse to the resources of this intellectual tradition does not justify their description as *populares tout court* – if such a thing ever existed – that is politicians wholly devoted to furthering the cause of the people and its interests through the popular assembly. Rather, this intellectual tradition provided politicians with a set of homogeneous referents of political values that could be adopted when and how they deemed them most appropriate, even only for one year of one's political career, the year of the tribunate.

This intellectual tradition did not diverge from its so-called 'optimat' counterpart in its understanding of the value of *libertas*, which was taken to signify a state of non-domination. They differ, however, on the institutional and political means regarded as necessary to achieve and preserve the liberty of the commonwealth, and on the related issue of the amount of liberty to be assigned to members of different sections of society.

According to the line of thought ascribable to the '*popularis*' tradition, a commonwealth could be free only when its institutional arrangements were such as to assign a prominent role to the popular assembly. Although a submerged ideology, attested only in fragments of speeches and discourse of the democrats in Cicero's *de republica*, these attestations show a clearly shared fashion of thinking about politics, very much distinct from the 'optimat' way of reasoning. Recognising the community as a whole as the sole repository of powers, the shared claim of this intellectual tradition was that, in order to preserve political liberty, every citizen should not only participate in political affairs, but also play a central role in governance. As the ultimate owner of all goods, the civic community – manifested in its institutional form of the popular assembly – was responsible for the enactment of the decisions binding on all and for the fair distribution of goods.

Manifest in our extant sources from the second half of the second century BC with the tribunes of the Gracchi, this fashion of political reasoning saw the civic community as intrinsically informed by the conception of corrective justice. This notion, which manifested itself in the idea of arithmetical equality, conceived all social interests of the citizens not only on an equal footing, but actually as one and the same. According to this intellectual tradition, the understanding of social interests as comprising the interests of each civic member of the community made all citizens recognise the common good as the same and strive in harmony to achieve it.

Since the redistribution of wealth was highly controversial, this understanding of justice led politicians to fight for equality of political rights,

which to their eyes constituted the minimum requirement for the liberty of the commonwealth to exist. Ultimately, therefore, these two intellectual traditions, the 'optimat' and the '*popularis*', not only differed on the institutional arrangements they considered capable to preserve the *libera res publica*, but also on how much liberty each section of society was entitled to have.

In contrast with the so-called 'optimat' intellectual tradition, for which it is possible to identify a canon of authors, only traces of a '*popularis*' family of thought can be discerned. Submerged under the weight of the 'optimat' intellectual tradition, the prevalent ideology in Rome, which provided the wealthy elite with a source of legitimacy for their dominant position in the commonwealth, traces of '*popularis*' ideology can nevertheless be found in politicians' fragmentary speeches, and, to a certain extent, in Cicero's *de republica*. Although rooted in Greek philosophy, this tradition did not find in Rome a political theorist in the mould of Polybius or Cicero, who extensively articulated its principal tenets in an eloquent and comprehensive scheme, or, if it did, work of this author has not survived.

However, in Cicero's *de re publica*, we find a very interesting attestation of a distinct way of conceiving politics, which cannot be attributed solely to Cicero's Greek sources. In the first book of the dialogue, in response to Laelius' question about the *optimus status civitatis*, Scipio discusses the different forms of constitution. He begins by providing the famous definition of *res publica*, and, after presenting the three simple forms of government (monarchy, aristocracy and democracy) and their tendency to degenerate into their negative counterpart, he expresses his preference for the mixed and balanced constitution, resulting from a mixture of the three primary forms.¹⁹¹ When Laelius asks which one of the simple forms of government Scipio favours, the response takes the form of speeches delivered, or at least presented, from the point of view of the supporters of democracy and aristocracy.¹⁹² When pressed, he then admits that his preference amongst the three simple forms is for monarchy.¹⁹³

However, whilst Scipio's argument in favour of monarchy emphasises the issue of administration and the advantages of a single *locus* of executive power, the arguments in support of democracy and aristocracy are focused on the virtues of each type of government. In his account, each side claims that the constitution that they favour is the best to embody the fundamental values of liberty and equality, for which they offer competing notions.¹⁹⁴

¹⁹¹ Cic. *Rep.* 1.39 and 1.45. On Cicero's mixed constitution see above 87ff.

¹⁹² Cic. *Rep.* 1.47–50 and 1.51–3.

¹⁹³ Cic. *Rep.* 1.54–5.

¹⁹⁴ Zetzel 1995: 21.

The speech of the democrats in support of the *civitas popularis* attests a Roman conception of politics which is very different from the political reasoning advanced by the authors of the so-called 'optimate' tradition. Although there is no doubt that the speech is informed by Greek philosophy, often recognised as Peripatetic in origin, the argument that Cicero makes the advocates of democracy advance is based on the literal sense of the Latin term *res publica*, for which there is no Greek equivalent.¹⁹⁵ Fundamentally, the supporters of democracy claim that the sole true *res publica* is the commonwealth in which the people are effectively in control of public affairs, as it is the only form of government that satisfies the meaning of that term as *res populi*.

At the beginning of the constitutional debate, in response to Laelius' question, Scipio begins by providing a definition of the object under investigation. Showing a familiarity with Greek philosophical methods of analysis, Scipio declares that the topic under discussion should be defined and agreed upon at the outset to prevent ambiguities and error.¹⁹⁶ In underlining the importance of a shared definition, Scipio follows a style of reasoning that, on the one hand, is dependent on Greek philosophy, and, on the other, was most appropriate to Roman forensic oratory, where cases, as the rhetorical treatises claim, should begin by offering a definition of the issue under discussion, a definition which should be based on ordinary conceptions.¹⁹⁷

'*Res publica*, then, is the property of a people (*res populi*). A people, further, is not just any gathering of humans assembled in any way at all; but it is a gathering of people in large number associated into a partnership with one another by a common agreement on law (*iuris consensu*) and a sharing of benefits (*utilitatis communione*).'¹⁹⁸ To Laelius' request to indicate the best *civitas*, a term very close to its Greek counterpart πόλις/πολιτεία, Scipio interestingly responds by focusing the discussion on the exclusively Roman term, *res publica*. Although Laelius' adoption was appropriate as it indicated all commonwealths (and not just the Roman government), Scipio's choice of *res publica* allows the debate to concentrate on the concern

¹⁹⁵ Brunt 1988: 326. As Schofield 1995a: 68–70 shows, the closest Greek term to the Latin *res publica* is τὰ κοινὰ τοῦ πλῆθους in Polybius (6.8.3). Ando 1999: 15 very interestingly shows the four different translations of *res publica* in the Greek version of Augustus' *Res Gestae*: τὰ κοινὰ πράγματα; τὰ δημόσια πράγματα; πάτρια; πάντα τὰ πράγματα. Cf. Ferrary 1982: 759–60 on the circulation of the idea of democracy in Rome. On the comprehensive Romanization of the source material on which this passage is based, particularly with regard to the philosophical justification for democratic equality, see Schofield 2012. On the almost certain Peripatetic nature of Cicero's sources for these two speeches see Pöschl 1936. Wirszubski 1950: 10 describes it as Greek in origin and 'probably purely literary in purpose'.

¹⁹⁶ Cic. *Rep.* 1.38. On the adaptation of Greek philosophical method see Asmis 2004.

¹⁹⁷ See the discussion in Asmis 2004. ¹⁹⁸ Cic. *Rep.* 1.39. See also above 96.

for the Roman commonwealth and to bring about the Ciceronian notion of commonwealth as a unified people.

As Asmis has shown, by using the terms *res publica*, *iuris consensu*, *utilitatis communione* and *societas*, Cicero builds up a conception of the commonwealth which is very much Roman in nature and, as such, comprehensible to ordinary Roman citizens.¹⁹⁹ Despite the Greek philosophical influences on this discussion, Scipio's definition was not only structured on the characteristically Roman notion of *res publica*, but was also articulated in terms of *societas* (partnership), a highly prominent feature of Roman juridical discourse as well as a legal institution pervasive throughout Roman society.²⁰⁰ It is plausible to assume then that when the supporters of democracy claim that, unless the people are in power, there could be no *res publica* that satisfies the requirement of Scipio's definition, they were referring to ideas of democracy, that, however Greek in origin and inspiration, were circulating in Rome in the first century BC.

According to this political reasoning, a democratic form of government (*civitas popularis*), where the deliberative body is the whole citizenry (*multitudo atque omnes*), is the best kind of constitution. Only this form of government, where all powers are in the hands of the people (*in qua in populo sunt omnia*), could truly embody liberty and equality.²⁰¹

In making such statements, the supporters of democracy advance two major claims. The first concerns the centrality of the popular assembly. For the definition of *res publica* as a *res populi* to be meaningful, they maintain, the power of the people within the commonwealth should be understood only in its strongest sense. The people should not be conceived as merely entrusting their power to someone else in charge of its exercise, but rather as directly enacting their own rule.

¹⁹⁹ Asmis 2004, a very stimulating work to which I am here in debt.

²⁰⁰ Although for a long time scholars have debated whether Cicero's definition had been more subjected to Platonic, Peripatetic or Stoic influences (see, for example, Berti 1963, Frede 1989 and Lintott 1997a), recent scholarship seems now unanimously to value Cicero's own contribution. See Schofield 1995a, the first scholar to argue most convincingly about Cicero's originality. On *societas* see below 163–5. The association between the notion of *res publica* and *societas* would still work even if one accepted Cancelli's intriguing, but ultimately unconvincing, interpretation of *consensus iuris* (at Cic. *Rep.* 1.39) as a subjective genitive as indicated by the *ius societatis*, see Cancelli 1972. On the issue see also Kohns 1974: esp. 488–93; Büchner 1984: *ad loc.* in reply to the criticism expressed by Cancelli 1972; and, most recently, the discussion by Zetzel 1995: *ad loc.* and 17–22.

²⁰¹ Cic. *Rep.* 1.42. In Cicero's *de republica civitas*, besides indicating the physical organization of the city, is used as a synonymous for *res publica* at 1.33, 1.42, 2.52, 6.13 (and as synonymous of *populus* at 1.49). In this passage (1.42), *civitas popularis* functions as the Latin equivalent of the Greek πολιτεία δημοκρατική, since the term δημοκρατία does not exist in Latin, hence the addition '*sic enim appellant*'. On this issue see Suerbaum 1977: 66–70 and Zetzel 1995: *ad loc.*

In a democracy, the people themselves are ‘masters of the laws and courts, of war and peace, of international agreements, and of every citizen’s life and property (*domini . . . legum, iudiciorum, belli, pacis, foederum, capitis unius cuiusque, pecuniae*). This government alone, they believe, can rightly be called a commonwealth, that is, the property of the people (*hanc unam rite rem publicam, id est rem populi, appellari putant*).’²⁰² In a monarchy or an aristocracy, they argue, the people are ultimately unfree. ‘Even in states [aristocracies] where everyone is ostensibly free . . . the people vote, elect commanders and officials, are canvassed for their votes, and have bills proposed to them, but really grant only what they would have to grant even if they were unwilling to do so, and are asked to give others what they do not possess themselves. For they have no share in governing power, in the deliberative function, or in the courts (*sunt enim expertes imperii, consilii publici, iudicii delectorum iudicum*), over which selected judges preside, for those privileges are granted on the basis of birth and wealth.’²⁰³

However, this is not the case in truly free communities such as at Athens or Rhodes, where when everything is done directly through the people (*omnia per populum geruntur*), the location of all political activities is the popular assembly. In discussing this form of government, Scipio refers to the example of Athens, where, after the Areopagus was deprived of its powers, the citizens ‘succeeded in carrying on all their public business by the resolutions and decrees of the people’.²⁰⁴ In Rhodes, whose form of government was a *popularis res publica*, ‘all the people were senators and common citizens alternately, and they had a regular system of rotation in accordance with which they acted as senators for certain months of the year, and as private citizens during certain other months. They received payment for attending meetings in both capacities, and both in the theatre and in the senate-house, the same men decided capital cases and those of every other sort (*tantum poterat tantique erat, quanti multitudo, senatus*).’²⁰⁵ As the case of Rhodes highlights, in Roman political discourse the distinctive traits of democracy were the omnipotence of the popular assembly on every issue concerning the community’s life and the absolute equality of political rights.

The second major claim the supporters of democracy advance in Cicero’s *de re publica* is that as with the notion of popular sovereignty, so too the conception of equality should be understood in its strongest sense. Their discussion is strongly reminiscent of Aristotle, who claims that those who support democracy as the best form of government recognise and practise

²⁰² Cic. *Rep.* 1.48.

²⁰³ Cic. *Rep.* 1.47.

²⁰⁴ Cic. *Rep.* 1.43.

²⁰⁵ Cic. *Rep.* 3.48.

the principle of arithmetical proportion.²⁰⁶ He claims that, to his eyes wrongly, the advocates of democracy adopt only one criterion to determine the relations among men, and extend it abusively to the other domains. ‘Democracy arose from men thinking that if they are equal in any respect they are equal absolutely – for they suppose that because they are all alike free they are equal absolutely, oligarchy arose from their assuming that if they are unequal as regards some one thing they are unequal wholly – for being unequal in property they assume that they are unequal absolutely; and the democrats claim as being equal to participate in all things in equal shares, while the oligarchs as being unequal seek to have a larger share, for a larger share is unequal.’²⁰⁷ It follows that, contrary to the notion of justice held in the so-called ‘optimate’ tradition, ‘democratic justice is the application of numerical, not proportionate, equality’.²⁰⁸ ‘The basis of a democratic state,’ Aristotle argues, ‘is liberty; which, according to the common opinion of men, can only be enjoyed in such a state [democracy]; this they affirm to be the great end of every democracy. One principle of liberty is for all to rule and be ruled in turn.’²⁰⁹

However, although certainly a notion of Greek philosophical ascendancy, these ideas came to penetrate the Roman conception of politics and inform its democratic discourse.

In Cicero’s *de republica*, the supporters of democracy are made to claim that ‘in no other commonwealth except that in which the people’s power is the greatest does liberty have any home; nothing can be sweeter than liberty, which, if it is not equal, is not even liberty. And how can it be equal – I won’t say in a monarchy, in which slavery is not even hidden or ambiguous – in those commonwealths in which everyone is free in name only?’²¹⁰

Skilfully exploiting different conceptions of justice, the supporters of democracy are reported to claim that, since a commonwealth is a partnership in justice, it is necessary for this civic association to be held together that numerical equality informs the relation between citizens.²¹¹ ‘They insist,’ Scipio maintains, ‘that harmony is very easily obtainable in a commonwealth where the interests of all are the same, for discord arises from

²⁰⁶ On the relation between Plato, Aristotle and Archytas on this notion see above 103 and 105.

²⁰⁷ Ar. Pol. 5.1301a26–b4. See also 5.1301b29–1302a8, where the mathematical basis behind the idea is made explicit. See also Nicolet 1976: 127–8.

²⁰⁸ Ar. Pol. 6.1317b2–10. The association between democracy and arithmetical equality is of long standing; Hdt. 3.80.6; Eur. Suppl. 438–41; Isocr. Loch. 20; Ps.-Andoc. 4 (Alcib.) 13, 16, 27; Pl. Rep. 8.557a; Ar. Pol. 6.1318a3–8. In Plato (Leg. 6.757b5) and Isocrates (Areop. 21–22) arithmetical equality is further associated to the democratic trait *par excellence*, the practice of lot, which from a logical point of view is the most obvious example of arithmetic equality. See above 102ff.

²⁰⁹ Ar. Pol. 1317b2–10. ²¹⁰ Cic. Rep. 1.47.

²¹¹ Cic. Rep. 1.49. On the passage see Büchner 1984: *ad loc.* and Zetzel 1995: *ad loc.*

conflicting interests, where different measures are advantageous to different citizens (*facillimam autem in ea re publica esse concordiam, in qua idem conducat omnibus; ex utilitatis varietatibus, cum aliis aliud expediat, nasci discordias*).²¹² Contrary to the criticism usually addressed against democracy, its advocates claim that the democratic form of government is stable and conducive to *concordia* since, in this form of government, the interests of individual citizens coincide with the interests of the community.²¹³

It follows that, as this form of government is characterised by the principle of numerical equality, and based on the assumption that men, being equally free, must be equal in everything, members of this civic community, the best form of government, should be equal in everything. However, 'if we cannot agree to equalise men's wealth,' the supporters of democracy state, 'and equality of innate ability is impossible, the legal rights at least of those who are citizens of the same commonwealth ought to be equal (*iura certe paria debent esse eorum inter se, qui sunt cives in eadem re publica*). For what is a commonwealth except an association or partnership in justice?'²¹⁴

The supporters of aristocracy regard democratic equality as misconceived for two main reasons. First, they consider that, even if achieved, it is impossible to preserve it for a considerable amount of time, since the people find themselves in the position of having to grant special honours and rewards to individuals. Second, they think this corrective justice, based on the notion of arithmetical proportion, is most unjust, since it abolishes all degrees of rank: 'what people call equality is in fact very unfair. When the same degree of honour (*honor*) is given to the best and the worst (and such must exist in any population), then equity itself is highly inequitable.'²¹⁵

Only in a democracy do the people possess equally all those political rights which allow them to rule and to be ruled, so as to become 'masters of the laws and the courts, of war and peace, of treaties, of the status and wealth of every individual'.²¹⁶ 'Since law' they argue 'is the bond which unites the civic association, and justice enforced by law is the same for all, by what justice can an association of citizens be held together when there is no equality among the citizens (*quare cum lex sit civilis societatis vinculum, ius autem legis aequale, quo iure societas civium teneri potest, cum par non sit condicio civium*)?'²¹⁷

The speech attributed by Cicero in *de re publica* to the supporters of democracy provides us with the most extensive theoretical exemplification

²¹² Cic. *Rep.* 1.49.

²¹³ On private and public interests see Steinwenter 1939, Jossa 1964 and Gabba 1979.

²¹⁴ Cic. *Rep.* 1.49.

²¹⁵ Cic. *Rep.* 1.53 (trans. by Zetzel 1999); cf. 1.49; cf. Sall. *Ad Caes. Sen.* 2.8.

²¹⁶ Cic. *Rep.* 1.48.

²¹⁷ Cic. *Rep.* 1.49.

of how Romans may have conceptualised democracy in the late Republic. Although certainly of Greek inspiration, the speech suggests a Roman fashion of conceiving democratic ideas, corresponding to arguments adopted by late Republican politicians in support of or against certain courses of action.

I shall now turn to investigate these claims as attested in the surviving speeches of the late Republic.

The first claim I shall concentrate on concerns the centrality of the popular assembly in government. The first well-known attestation of this is found in Tiberius' speech justifying his demotion from office of Octavius, his colleague in the tribunate. When the latter interposed his veto on the Gracchan agrarian measure, Tiberius proposed that Octavius should be removed from office. If tribunician interference with the authority of the senate and magistrates was not in itself a novelty, the arguments that Tiberius advanced to support it were perceived as truly revolutionary – an innovation that only few Roman senators were prepared to sustain and that lost Tiberius crucial support from the elite.²¹⁸

Plutarch reports Tiberius' argument, in a speech whose authenticity has been demonstrated by Badian:²¹⁹ 'a tribune, [Tiberius] said, was sacred and inviolable, because he was consecrated to the people and was a champion of the people. "If, then," said Tiberius, "he should change about, wrong the people, maim its power, and rob it of the privilege of voting, he would by his own acts have deprived himself of his honourable office by not fulfilling the conditions on which he received it."'²²⁰

In Gracchus' argument, the people are the sole source of power, to whose will the magistrate needs to conform fully. If a tribune of the plebs tries to demolish the Capitol, Tiberius is reported to have stated, or set fire to the naval arsenal, he is certainly a bad tribune, but still a tribune. However, if 'he annuls the power of the people, he is no tribune at all'.²²¹ It is the people who grant power, and, therefore, it is the people who are entitled to withdraw it. It would be, otherwise, a constitutional solecism for a tribune, who is conceived as the direct personification of the people (a personification that acts not as the representative of the people's will in the public pursuit of their interests, but rather as direct expression of their will) to have recourse to the veto in order to deny the people themselves the opportunity to express their wishes in legislation.²²² There is no institution in Rome that is above this source of power. 'What institution at Rome

²¹⁸ On anti-senatorial tribunician activity in the decades before the Gracchi see Taylor 1962.

²¹⁹ Badian 1972b: 708. See also Sordi 1978 who identifies its source in Gaius Gracchus' book to Pomponius.

²²⁰ Plut. *Ti. Gracch.* 15.2.

²²¹ Plut. *Ti. Gracch.* 15.3.

²²² Cf. Brunt 1988: 21.

is so holy and venerable as that of the Virgins who tend and watch the undying fire? And yet if one of these breaks her vows, she is buried alive; for when they sin against the gods, they do not preserve that inviolable character which is given them for their service to the gods. Therefore, it is not just that a tribune who wrongs the people should retain that inviolable character which is given him for service to the people, since he is destroying the very power which is the source of his own power. And surely, if it is right for him to be made tribune by a majority of the votes of the tribes, it must be even more right for him to be deprived of his tribuneship by a unanimous vote.²²³ The argument that Tiberius puts forward is informed by the assumption that, since the tribune receives his power by popular election, his consecration, which confers on him his *sacrosanctitas*, is itself also a result of the people's election. It follows, according to Tiberius, that if a tribune's acts do not correspond to the people's wishes, the people may remove him from office and he would lose, alongside the magisterial power, also his *sacrosanctitas* and inviolability.²²⁴

Perhaps as a consequence of both using Asinius Pollio as a source (who, in turn, may have adopted Gaius Gracchus' memoirs), Appian reports a very similar argument as that attributed to Tiberius by Plutarch.²²⁵ He claims that Tiberius Gracchus 'said that he would take the vote at the *comitia* of the following day, both on the law and on the official rights of Octavius, to determine whether a tribune who was acting contrary to the people's interest could continue to hold office'.²²⁶

The fundamental assumption on which Tiberius' main argument is based is the idea of the tribune of the plebs as the institutional personification of the people's will. According to this notion, this Roman magistrate was not meant simply to *represent* the people's will – that is to say, he was not entrusted by the people with the pursuit of their interests; rather, he was expected to conform entirely to their wishes. As has often been underlined, this notion of the tribunate was very much in line with Polybius' description of the magistracy, when, in describing the limitations upon the senate's power, he refers to the checks that the people can exercise over it through the tribunician veto: 'and here it is to be observed that the tribunes are always obliged to act as the people decree and to pay every attention to their wishes'.²²⁷ This striking affinity between Tiberius' and Polybius' view of the tribune of the plebs has induced scholars to imagine that Polybius

²²³ Plut. *Ti. Gracch.* 15.4–5.

²²⁴ Zecchini 1997: 142 and Sordi 1981.

²²⁵ Sordi 1978 suggests that a tradition hostile to the Gracchi had found its way into Asinius' work showing Tiberius as not only politically dangerous, but also religiously impious.

²²⁶ App. *B. Civ.* 1.12. See Fraccaro 1914: 109–18 on the differences between Plutarch and Appian.

²²⁷ Polyb. 6.16.5; Badian 1972b: 709.

must have inserted this remark after Tiberius' tribunate in 133 BC, adding it to a book clearly completed in the main in 150 BC.²²⁸ However, despite their apparent similarities, there is one very important difference in the way in which the tribunate is conceived in Polybius' work and Tiberius' speech. Whilst Polybius inserts the role of the tribune of the plebs within a complex web of institutional checks and balances, which act as one of the guarantors of the commonwealth's liberty, Tiberius Gracchus presents the tribune as an institutional enabler of the people's political power, power which resided solely in their hands – that is, ultimately, in the popular assembly.

This notion that the people was the only repository of all powers had emerged with dramatic force in 133 BC, just before Tiberius advanced his agrarian proposal, when Attalus III Philometor died and made 'the Roman people his heir' by his will.²²⁹ Contrary to Roman institutional custom, which saw foreign policy as the senate's domain, Tiberius said that 'as regards the cities which were included in the kingdom of Attalus, it did not belong to the senate to deliberate about them, but he himself would submit a pertinent resolution to the people'.²³⁰ Tiberius conceived the people as the sovereign power, and what belonged to the Roman people should be redistributed amongst the members of the *populus Romanus*. Tiberius therefore proposed a law which 'provided that the money of King Attalus, when brought to Rome, should be given to the citizens who received a parcel of the public land, to aid them in stocking and tilling their farms'.²³¹

When advocating this agrarian proposal, he put forward a similar argument, with a remarkable eloquence that has long been remembered by teachers and students of rhetoric: 'The wild beasts that roam over Italy . . . have every one of them a cave or lair to lurk in; but the men who fight and die for Italy enjoy the common air and light, indeed, but nothing else; houseless and homeless they wander about with their wives and children. And it is with lying lips that their imperators exhort the soldiers in their battles to defend sepulchres and shrines from the enemy; for not a man of them has an hereditary altar, not one of all these many Romans an ancestral tomb, but they fight and die to support others in wealth and luxury, and though they are styled masters of the world, they have not a single clod of earth that is their own.'²³²

²²⁸ Earl 1963: 87–8. ²²⁹ Plut. *Ti. Gracch.* 14.1.

²³⁰ Plut. *Ti. Gracch.* 14.2. ²³¹ *Ibid.*

²³² Tiberius Gracchus fr. 13 (Malcovati 1955: 149 = Plut. *Ti. Gracch.* 9.5).

This vivid image of the Roman people who fight and die for someone else's luxury, but are themselves bereft of even the smallest plot of land, implies in ideological terms that the *populus Romanus* should be given what belongs to them, and that this *hiatus* between the great name of the Roman people, universally hailed as the master of the empire, and the actual Roman citizens, who made up the army and (at least ideologically) the popular assemblies, should be reconciled.

The same line of argument was adopted ten years later by Tiberius' brother, when he advised the Roman people not to leave a territory to any of their allied kings, but rather to annex it to their own empire: 'I encourage you to increase your incomes so as to be able to administer more easily your interests and the *res publica*.'²³³ Gaius Gracchus thus equates the interest of the people with the interests of the whole *res publica* and it is possible to deduce from the preserved allusion that he put forward an analogous argument in defence of his corn measure, for which he was often accused of dilapidating the treasury. He defended himself, as Cicero reports, by claiming that he was acting as the true defender of the treasury,²³⁴ and in a fragment replied ironically to the accusation of ruining public finances by stating that he may have been emptying the public treasury, but he would have been doing so 'in the interests of the Roman people'.²³⁵

The examples of the Gracchi resonated with Roman politicians throughout the Republic and beyond. Their eloquence was renowned, although often as a splendid ability put to misuse, and their political actions and final tragic ends became the subject-matter of the rhetorical exercises on which new generations of politicians were trained.²³⁶

When, in 67 BC, the tribune of the plebs Trebellius interposed his veto on Gabinius' proposal to confer Pompey extraordinary powers to fight the pirates, Gabinius did not hesitate to respond as Tiberius had done sixty years or so before against Octavius and proposed Trebellius' deposition from office. Although the arguments that Gabinius put forward have not survived, the similarities in the extraordinary circumstances between Gabinius' and Tiberius' case are so striking that it would not be too hasty to conjecture that the tribune of 67 BC may also have called upon the notion of popular sovereignty in support of his action.²³⁷

²³³ Gaius Gracchus fr. 44.6–7 (Malcovati 1955: 188).

²³⁴ Gaius Gracchus fr. 42 (Malcovati 1955: 187).

²³⁵ Ferrary 1982: 753–4. ²³⁶ Cic. *De or.* 1.38, 3.226; *Inv.* 1.5.

²³⁷ The similarities between the two cases were already highlighted by Asconius (72C). The important difference, however, was that, contrary to Octavius, who did not desist from his position, Trebellius, as soon as he realised that only one more tribe remained to confirm his deposition, withdrew his veto.

This is certainly what Cicero did two years later in his defence of Cornelius. Cicero was faced with a difficult case: Cornelius had been accused of reading out his legislative codex despite the interposition of a veto, and there is a little doubt that he had actually done so. Cicero later tried to play down Cornelius' actions as much as possible by saying that the tribune had simply touched the codex, or later that he had merely read out the bill to refresh his memory.²³⁸ At the trial, Cicero compared Cornelius' behaviour with that of his colleague Gabinius, who, in the tenure of his tribunate, had not only gone much further than Cornelius, but had also done so with impunity. 'It is no greater matter,' claims Cicero, 'to read out a codex while a veto is being entered, than to take round the urn for lots in person in the very presence of the person entering the veto; nor a more serious matter to begin the passage of a law than to see it through; nor more impetuous to show oneself ready to legislate against the wishes of a colleague than to annul the office of the colleague himself; nor any more a matter for criminal charges to summon the tribes to vote for ratifying a law than for rendering a colleague a private citizen. All these things a gallant person, this man's colleague A. Gabinius, did in an excellent cause, and in bringing an end to long-standing disgrace and servitude for the Roman people and for all nations, he did not permit the voice and preference of one single colleague to prevail over those of the state as a whole (*passus est plus unius collegae sui quam universae civitatis vocem valere et voluntatem*).'²³⁹ In proposing his law which would have liberated the Roman people from the constant and insidious threat of the pirates, Gabinius had been loyal to the people's wishes and true to the character of his office. By doing so, Cicero, who had admired him and supported him openly in the *pro lege Manilia*, says that Gabinius had not let the will of a single individual prevail over the will of the *universa civitas*.²⁴⁰ Possibly echoing the argument advanced by Gabinius himself, Cicero defends the tribune's action by referring to the notion of the sovereignty of the popular will and, implicitly, to Tiberius' conception of the tribunate of the plebs.

As Ferrary shows, the ideological struggle between Tiberius and Octavius had given rise to two antagonistic political conceptions.²⁴¹ The first, which is associated with the 'democratic' tradition, emphasises the role played by the people in the equilibrium of institutional arrangements and stresses the pre-eminence which should be assigned to the people's will in its

²³⁸ Quint. *Inst.* 5.13.25; Cic. *Vat.* 5.

²³⁹ Cic. *Corn.* 1. 31 Cr. = Asc. 71.17C. See Crawford 1994: *ad loc.* and Lewis: 2006 *ad loc.*

²⁴⁰ Cic. *Leg. Man.* 52–3. ²⁴¹ Ferrary 1982: 757.

institutional locus; the second, associated with the 'optimat' tradition, accentuates the tribunate's power of veto and his *sacrosanctitas* as well as the principle of magisterial collegiality.

In Cicero's ideal code, one of the laws states that 'a veto should be respected (*parere... intercessori*)'.²⁴² These are the laws designed for the best form of government, the mixed and balanced constitution which Cicero described in the *de re publica*.²⁴³ In this kind of government, the tribunate's power to veto should be upheld as one of the means which preserved the commonwealth's liberty. If a tribune put a halt to a measure, Cicero claims, this should be respected, not necessarily because the person who poses the veto is certainly doing the right thing; actually, it is possible, Cicero hypothesises, that the tribune who interposed his veto halted a very good proposal. However, 'it is better,' Cicero comments, 'that a good measure should fail than that a bad one should be allowed to pass'.²⁴⁴ As another law also dictates, 'he who vetoes a bad measure shall be deemed a citizen of distinguished service (*intercessor rei malae salutaris civis esto*)', so that everyone would be 'eager to come to the rescue of the Republic, in the hope that his praise might be heralded forth by the clear voice of this law'.²⁴⁵ The fundamental point that these provisions highlight is that the tribunate of the plebs, often perceived as an exclusively popular magistracy, plays an essential function in Ciceronian political theory as well as in the whole intellectual tradition of which Cicero is the main representative. Within this tradition, the tribunes fulfilled an important role in the system of 'checks and balances', acting as one of the vital institutional guarantees, for the preservation of the commonwealth's liberty. The emphasis on its power of veto, which, although not solely the tribunes' reserve, was mainly associated with them, favours a form of government characterised by a mixed and balanced constitution, rather than a political system where the people's will prevails.²⁴⁶ The veto came to be perceived in theoretical terms, probably in connection with the arguments adopted in the political conflict of Tiberius' time, as an integral part of the mixed and balanced constitution. In Cicero's ideal code, then, the tribunician *intercessio* was preserved because it could obstruct the power of the assembly and offset the danger of direct popular sovereignty.

²⁴² Cic. *Leg.* 3.42. An echo of this debate and of the emphasis that one intellectual tradition attached to the role of the veto, may also be found in Livy 5.29.8–9. *Contra* Ogilvie 1965: *ad loc.*

²⁴³ Cic. *Leg.* 3.12; cf. 3.4. ²⁴⁴ Cic. *Leg.* 3.42.1. ²⁴⁵ Cic. *Leg.* 3.43.2–3.

²⁴⁶ This appears to be the ideological perception of role of the tribunate, regardless the actual political practices. For the period between 70 and 49 BC de Libero 1992: 33–6 counts twenty-four (certain) cases of *intercessio* on legislation in the senate and seven in the *concilium plebis*. See Chapter 2: 52ff.

If the Gabinius episode had almost lent itself to an ideological interpretation along Gracchan lines, there is little doubt that this distinct conception of politics, which had emerged prominently in Roman political debate in 133 BC, had spread amongst the educated members of the elite and was well known by the time of the late Republic. Early in his career, Licinius Crassus had argued before a *contio* in support of the *lex Servilia iudiciaria*, which, introduced by Servilius Caepio in 106 BC, sought to deprive the *equites* of their exclusive right to serve as *iudices* in the courts.²⁴⁷ In this speech, Antonius reports Crassus as saying ‘Deliver us from our miseries, deliver us from the jaws of those whose cruelty cannot be sated by our blood alone! Do not allow us to be slaves to anyone but yourselves, the people as a whole, whose slaves we can and ought to be (*servire . . . vobis universis*).’²⁴⁸ In his attempt to uphold the *auctoritas senatus*, by exalting the people’s pre-eminent role in the commonwealth, Crassus deflected his audience’s hatred towards the *equites*. The senators not only can, but ought to be slaves to the people as a whole; it is the popular will which should prevail as a leading guide of the whole community.

This conception of the division of power, Antonius replied, was very remote from the political views prevalent in Rome. According to these, the source of power resides in the people, but they entrust it to the magistrates and, ultimately, the senate in order to be guided and controlled. ‘I’ll pass over “miseries,”’ Antonius responds, ‘which, according to those philosophers, cannot touch a brave man; and I’ll pass over the “jaws” from which you want to be delivered, that your blood might not be sucked up because of an unjust judgment, which they say cannot happen to a wise man. But how could you dare to say that not only you, but even the entire senate, whose cause we were then pleading “were slaves”? Can virtue be a slave, Crassus, according to the authorities you mentioned, whose teachings you incorporate within the orator’s skill? . . . For your additional statement, that the senate not only can, but even ought to be slaves to the people, what philosopher could be so soft, so fainthearted, so spineless, so inclined to measure everything by the standard of bodily pleasure and pain, that he could sanction the notion that the senate is a slave to the people, when the people themselves have, so to speak, handed over to the senate the

²⁴⁷ The exact nature of the law is rather unclear: according to a Tacitean tradition (*Ann.* 12.60.3) the *lex Servilia* gave back the *iudicia* to the senate, whilst according to a Livian tradition (*Obseq.* 41) the law made a compromise, assigning the membership of the *iudicia* to senators and *equites* together. It is not even certain whether it failed to be passed, or was very short-lived. See Cic. *Cluent.* 140; *Orat.* 1.225, 2.199; *Brut.* 161, 164.

²⁴⁸ Cic. *De or.* 1.225.

reins, that is, the power to control and guide them (*senatum servire populo, cui populus ipse moderandi et regendi sui potestatem, quasi quasdam habenas tradidisset*)?²⁴⁹

Crassus claimed that the orator should resort to the discussion of philosophers in order to enhance the fullness of his oratory. He practised this in his own speeches, and Cicero had learnt the lesson well.²⁵⁰ Not only was Crassus in charge of Cicero's education, and exposed him to his debates and disputations with other teachers with apparent omniscience and in fluent Greek, but had also published his own speeches, including the one delivered in favour of the *lex Servilia* in the year of Cicero's birth, which was still being circulated and memorised by students of oratory fifteen years later.²⁵¹ As Cicero himself would admit in the *Brutus*, many years later, 'For me, at any rate, that speech in favour of the law of Caepio was from my boyhood in some sort a textbook (*quasi magistra fuit . . . illa in legem Caepionis oratio*). In it the dignity of the senate (*auctoritas . . . senatus*) was upheld, on behalf of which its most famous passages were spoken, and it sought to inspire hatred of the group from which both judges and prosecutors were drawn, against whose influence it was necessary to speak in such a manner as to win popular favour.'²⁵²

Therefore, the knowledge of political notions belonging to a different way of conceiving politics came to be spread through the writing of the philosophers as well as through public speeches that were carefully studied and memorised. Although adopted in many cases functionally to win an argument, rather than out of true genuine commitment, these ideas were deeply informed by philosophical systems, which, even if not accepted in their totality, provided important ammunition to present convincingly a successful argument. Proving the revolutionary and long-lasting significance of Crassus' argument, in the first half of the 40s Cicero responded to Crassus' claims from a philosophical point of view, in an attempt to show the argument's invalidity within the same Stoic philosophical system by which Crassus' argument was informed. 'What is the value of that oration,' Cicero asks, 'marked by more fluency than wisdom, delivered by a man of the greatest eloquence, Lucius Crassus? "Rescue us from slavery": what slavery does this mean, as affecting so famous and distinguished a person?

²⁴⁹ Cic. *De or.* 1.225–6. ²⁵⁰ Cic. *De or.* 1.230.

²⁵¹ Cic. *Brut.* 161; *De or.* 2.2. Cf. *Rhet. Her.* 4.5 which attests the fame of the speech, since it is used as an example of the rhetorical figure of the ὁμοιοτέλευτον. The most illuminating pages on Crassus are to be found in Fantham 2004: 27–8. On Cicero and Crassus see Rawson 1971: 75–88 (= 1991b: 16–33).

²⁵² Cic. *Brut.* 164; cf. 161.

All the timidity of a weakened and humbled and broken spirit is slavery. “Do not allow us to be in slavery to anybody”: does he want to be emancipated in the literal sense? By no means; for what does he add next? “Except to your entire body (*nisi vobis universis*)”: he wants to change masters, not to be free (*dominum mutare, non liber esse vult*); “whose servants we both can be and ought to be”. We, on the contrary, as we have a high and lofty spirit, exalted by the virtues, neither ought to be nor can be; but for your part by all means say that you can, inasmuch as no one owes any service save what it is dishonourable not to render.”²⁵³ Shifting the focus of the argument, Cicero states that, according to the Stoics, only virtue is, or should be, men’s guide, and a status of slavery comes to be established only when men’s spirit is subjected to passions and fears. Crassus, in his exaltation of the people’s political supremacy, has not liberated the senators from the yoke of equestrian slavery, but rather has simply replaced such a yoke with that of the people, the new senators’ master.

A few years later, Antonius acted in defence of Norbanus, who, most probably in 95 BC, had been prosecuted under *maiestas* for having overridden a veto by mob violence.²⁵⁴ In Cicero’s *de oratore*, Antonius recalls the trial and describes the contention between himself and the prosecutor Sulpicius as a case of definition, where ‘the terms in which an act should be described are in dispute’.²⁵⁵

Very interestingly, and, to a certain extent, surprisingly for the prosecution, Antonius did not deny most of the indictments against his client, and accepted that the accused had indeed provoked mob violence. When the prosecutor Sulpicius evoked the tribune’s vehemence, his cruelty to Caepio, the injury to Aemilius Scaurus *princeps senatus* and his violation of the *sacrosanctitas* of the tribunes Cotta and Didius, Antonius seemed to accept that reconstruction and almost appeared to seek pardon for his client. However, he then gradually built the picture not of Norbanus’ provocation, but rather of the righteous anger of the Roman people. From there, Antonius was able to rise to a denunciation of Caepio, which he pursued during his interrogation of the hostile witness.

It was crucial for Antonius’ case to show that the people themselves were animated by righteous anger, that the sedition was not wished for

²⁵³ Cic. *Par. Stoic.* 5.41.

²⁵⁴ On the trial of Norbanus see Alexander 1990: 44–5 n.86. Badian 1964 has an extended discussion. On the rather complex chronology see Ferrary 1979: 92–101. Badian 1957: 320 is inclined to propose 95 BC.

²⁵⁵ Fr. 25 (Malcovati 1955: 231 = Cic. *De or.* 2.107). See also 2.164, 2.167, 2.199. For a reconstruction of Antonius’ argument see Fantham 2004: 38–9.

by Norbanus, but rather by the Roman people, who were animated by a 'wrath, which was not wrongful, but just and well-deserved'.²⁵⁶ By asserting that Norbanus was not guilty of *maiestam minuere* in virtue of the *lex Appuleia*, Antonius first illustrates a concept by its association: 'If *maiestas* is the greatness and dignity of the state (*maiestas est amplitudo ac dignitas civitatis*), it was violated by the man who delivered up to an enemy an army of the Roman people, not by him who delivered the man who did it into the power of the Roman people (*qui eum . . . populi Romani potestati tradidit*).'²⁵⁷ Presenting the argument from *genus* he states: 'If magistrates should be under the control of the Roman people, why are you accusing Norbanus, whose tribunate was obedient to the popular will (*si magistratus in populi Romani potestate esse debent, quid Norbanum accusas, cuius tribunatus voluntati paruit civitatis*)?'²⁵⁸

In his defence of Norbanus' actions, Antonius expresses the notion of the tribunate first elaborated by Tiberius Gracchus. According to this view, the tribunes of the plebs neither interpret the people's wishes nor act in their interests, of which they function as judges, but rather obey the people, providing them with an institutional means to enforce their wishes legally. The popular will finds its most powerful expression in the popular assembly, in which direct sovereignty lies, and in whose *potestas* the magistrates are. The magistrates, in other words, are in a position of subjection.

It was therefore important for Antonius to show that in employing violence to override obstruction, Norbanus had the people's approval, since he was acting according to their wishes. Citing precedents where the people's legitimate indignation had been beneficial to the whole community, Antonius referred, as Tiberius Gracchus had done before, to the expulsion of the tyrant Tarquinius, and recalled, as Cicero would do a few years later in his defence of Cornelius, the establishment of the tribunate.²⁵⁹ Apart from underlining the obvious fact that certain historical events of the Roman past could be interpreted within 'democratic' political categories more easily than others, this concomitance of examples supports the idea that there was an intellectual tradition or set of concepts which had a submerged existence, but was propagated through rhetorical and philosophical training, and could be used by Roman politicians of the late Republic to argue their cases.

²⁵⁶ Cic. *De or.* 2.203. ²⁵⁷ Cic. *De or.* 2.164. ²⁵⁸ Cic. *De or.* 2.167.

²⁵⁹ For Antonius Cic. *De or.* 2.199–200; for Tiberius Plut. *Ti. Gracch.* 15.4; for Cicero Asc. 76.5C. = Cic. *Corn.* 1.47 Cr. See [Chapter 4](#): 190ff for Catulus' similar remark in Plut. *Pomp.* 30.4.

Asserting the political superiority of the popular assembly over the magistrates, Antonius referred to a conception of *maiestas populi Romani* which consisted of the preservation of the people's power and right. Answering the question of whether Norbanus' conduct was treasonable (*minueritne maiestatem*), Antonius' response was that 'his somewhat disorderly procedure in respect of Caepio involved no treason; the violence in question was aroused by the just indignation of the public and not by the action of the tribune; whereas the majesty of the Roman people (*maiestas*), in so much as this means greatness (*magnitudo*), was increased rather than diminished in the maintenance of its power and right (*populi Romani in eius potestate ac iure retinendo aucta est potius quam diminuta*)'.²⁶⁰

As Ferrary has shown, Antonius' notion of *maiestas populi Romani* in Norbanus' defence echoed rather closely the way in which Saturninus conceived this notion in 100 BC, when he first set up a court to adjudicate cases against those who had made an attempt on *maiestas populi Romani*.²⁶¹

When, despite tribunician *intercessio* and a senatorial decree which declared that his actions were opposed to the *res publica*, Saturninus was about to put his *lex frumentaria* to vote, the quaestor Caepio resorted to violence in order to prevent him from going ahead.²⁶² Probably in reaction to these events, Saturninus set up the *maiestas* court, and the senate responded by passing a so-called '*senatus consultum ultimum*' presented as aiming at the preservation of the *imperium* and the *maiestas* of the Roman people.

Saturninus had thereby imported the notion of *maiestas populi Romani*, which belonged to the domain of foreign policy, into domestic affairs. What had been a formula indicating the superiority of the Roman people over other populations had come to indicate the superiority of the popular assembly over magistrates and senate, and the assembly's right to express its will through a legislative vote. This right had been trampled on by Caepio by his use of violence, and by the senate with its *senatus consultum* and it was to this form of obstruction that Saturninus was attempting to pose resistance.²⁶³ The senate reacted by appropriating and redescribing the notion of *maiestas*, associating it with *imperium* in their formulation of the so-called '*senatus consultum ultimum*', which it then passed at the end of the year. The notion that was created to express the power of the popular assembly came to illustrate the *dignitas* and *amplitudo civitatis*, no longer

²⁶⁰ Cic. *Part. Or.* 104–5. ²⁶¹ Ferrary 1983: 556–72.

²⁶² On Quintus Servilius Caepio see Broughton 1951: 1 576.

²⁶³ See Livy 38.11.2 for *maiestas* in relation to foreign relations. See also Hellegouarc'h 1963: 314–20 and Ando 2011: 73–4.

understood as the sum of individual citizens who conceptually composed the popular assembly.²⁶⁴

Interestingly, this episode was taken as an example by the rhetorical textbooks of the late Republic when discussing the issue of definition. As the *Rhetorica ad Herennium* reports, 'when we deal with the issue of definition, we shall first briefly define the term in question, as follows: "He impairs the sovereign majesty of the state who destroys the elements constituting its dignity. What are these, Quintus Caepio? The suffrage of the people and the counsel of the magistracy (*maiestatem is minuit qui ea tollit ex quibus rebus civitatis amplitudo constat. Quae sunt ea, Q. Caepio? Suffragia populi et magistratus consilium*). No doubt, then, in demolishing the bridges of the Comitium, you have deprived the people of their suffrage and the magistracy of their counselling." Likewise, in reply: "He impairs the sovereign majesty of the state who inflicts damage upon its dignity (*maiestatem is minuit qui amplitudinem civitatis detrimentum adficit*). I have not inflicted, but rather prevented, damage, for I have saved the treasury, resisted the licence of wicked men, and kept the majesty of the state from perishing utterly." Thus the meaning of the term is first explained briefly, and adapted to the advantage of our cause; then we shall connect our conduct with the explanation of the term.'²⁶⁵ In the early 80s, therefore, very much in line with the senate's redescription, the definition of *maiestas* that seems to prevail is deprived of any reference to the absolute prevalence of the popular assembly's power, and, next to the people's right to vote, assigns an important role of the magistrates' *consilium*.

A similar, although slightly more equivocal, position is found in Cicero's *de inventione*.²⁶⁶ In discussing the issue of definition Cicero states that '*maiestatem minuere* is a lessening of the dignity or high estate or authority of the people or of those to whom the people have given authority (*de dignitate aut amplitudine aut potestate populi aut eorum quibus populus potestatem dedit aliquid derogare*)'.

The distinction between two ways of conceiving the *maiestas populi Romani*, to which Cicero may be alluding here, one centred around a direct exercise of popular sovereignty (*potestas populi*), the other around the devolving of popular sovereignty upon magistrates (*quibus populus potestatem dedit aliquid derogare*), re-emerges in much sharper and well-defined contrast in the late 50s to early 40s. The *Partitiones Oratoriae*, designed, in the first instance, to illustrate the principles of rhetoric to Cicero's son, discusses the issue of definition as the first battleground between two

²⁶⁴ Ferrary 1983.

²⁶⁵ *Rhet. Her.* 2.12.17; cf. 4.47.

²⁶⁶ *Cic. Inv.* 2.53.

opponents, and does so by returning once again to the example of *maiestas* and its role in the trial of Norbanus. Interestingly, Cicero presents two competing definitions of *maiestas*, which conceive the people's power in very different terms, and attest their potential deployment in the advocacy of individual cases. 'Was Norbanus' conduct "treasonable (*minueritne maiestatem*)?" ... His somewhat disorderly procedure in respect of Caepio involved no treason; the violence in question was aroused by the just indignation of the public and not by the action of the tribune; whereas the majesty (*maiestas*) of the Roman people, in so much as this means greatness (*magnitudo*), was increased rather than diminished in the maintenance of its power and right (*populi Romani in eius potestate ac iure retinendo aucta est potius quam diminuta*).²⁶⁷ When the terms of reference are that 'majesty resides in the dignity of high office and of the name of the Roman people (*maiestas est in imperii atque in nominis populi Romani dignitate*)', which was impaired by one who employed mob violence to promote sedition, the question will arise whether 'one who employed violence to effect a result that was acceptable and equitable with the consent of the Roman people, really diminished the majesty of the people (*minueritne maiestatem qui voluntate populi Romani rem gratam at aequam per vim egerit*)'.²⁶⁷

To those who could claim that the true *maiestas* of the Roman people resided in the high office of the magistrates and referred to a more comprehensive notion of *populus Romanus* (not focused on its institutional form of popular assembly), others could reply that, if it could be demonstrated that a tribune in adopting violence had acted in accordance with the people's will, '*maiestas*, which consists in a kind of grandeur of the Roman people in the retention of its power and right, was not diminished, but rather increased [by his action]'. Therefore, overwhelming popular support for legislative proposal, if demonstrated, could function as a justification for the tribunes' use of violence to enforce the will of the whole citizen-body.

This conceptualisation of *maiestas*, which can be first attributed to Saturninus, illustrates how the '*popularis*' intellectual tradition recast the issue of accountability. In 103 BC Caepio the Elder was put on trial because of his defeat at Arausio by the Cimbri, and, condemned, was deprived of his *imperium* by popular will (as expressed in a *iudicium populi*).²⁶⁸ 'If *maiestas* is *amplitudo ac dignitas civitatis*, it was violated by the man who delivered up to the enemy an army of the Roman people, not by him who delivered

²⁶⁷ Cic. *Part. Or.* 104–5.

²⁶⁸ See Livy *Per.* 67; Asc. 78C. On Quintus Servilius Caepio the Elder see Broughton 1951: I 557; on the exact nature of the charge against him see Ferrary 1979: 92.

the man who did it into the power of the Roman people (*populi Romani potestati tradidit*).²⁶⁹ It follows that it was not Norbanus who had diminished the power and the right of the Roman people, but rather Quintus Caepio, who, having lost his army, had been rightly debarred from office and sent into exile. By following the popular will, Norbanus had dutifully fulfilled the role of Roman magistrates, that is to be *in potestate populi Romani*.²⁷⁰ The principle at work in the justification of Caepio's trial is the idea that, since power resides in the people, if an individual acts as an agent of such a power, he will have fully conformed to his function; if, on the other hand, he diminishes it, he will be rightly removed from office.

This argument recalls the case put forward much more strongly by Tiberius Gracchus in support of the deposition of the tribune Octavius. As Appian states, when 'daunted by nothing, Octavius again interposed, Gracchus proposed to take the vote on him first . . . and when the majority of tribes was about to be reached, Tiberius implored Octavius "not to frustrate the wishes so earnestly entertained by the people, whose desires he ought rather to share in his character of tribune, and not to risk the loss of his office by public condemnation"'.²⁷¹ The principle at stake was that of absolute popular sovereignty: 'Is it not, then, a monstrous thing,' he is reported to have said, 'that a tribune should have power to hale a consul to prison, while the people cannot deprive a tribune of his power when he employs it against the very ones who bestowed it? For consul and tribune alike are elected by the people.'²⁷²

The possibility for a magistrate to be forced to lay down his *imperium* had already been in place before the Gracchi.²⁷³ Proposed several times, but never implemented, it had been eventually put into practice for the first time in 136 BC against M. Aemilius Lepidus Porcina.²⁷⁴ However, whilst the frequency of official dismissal by law saw an increase after the tribunate of 133 BC, what truly changed with Tiberius Gracchus was the introduction of a new way of conceiving accountability.²⁷⁵ In the so-called 'optimates' tradition, as Polybius illustrates, magistrates are held accountable by the sovereign people as the repository of powers entrusted to them by election.

²⁶⁹ Cic. *De or.* 2.164. ²⁷⁰ Cic. *De or.* 2.167.

²⁷¹ App. *B. Civ.* 1.12. ²⁷² Plut. *Ti. Gracch.* 15.3.

²⁷³ Festus 211: *magistratus dicebantur qui coacti deposuerunt imperium*. On the distinction between the deposed magistrates and the *abacti* see Ferrary 1979: 97, n.35. On abrogation more in general see Lintott 1999: 62 and n.96.

²⁷⁴ See App. *Hisp.* 83. As far as the failed cases are concerned, see Livy 22.25.20 (against the dictator Fabius Maximus in 217 BC), 27.20.21 (against the proconsul M. Claudius Marcellus in 209 BC) and 29.19.6 (against the proconsul P. Cornelius Scipio in 204 BC).

²⁷⁵ See Mommsen 1887–8: 1 628–30, according to whom the Gracchi marked an increase of the possibility of dismissal.

It follows that they are called to give an account of their actions if they are accused of behaving *non iure*, that is, in ideological terms, if they are considered as not having upheld the civic agreement on laws, on which the civic community was founded.²⁷⁶ In the ‘*popularis*’ tradition that is best attested in Tiberius’ speech, since the people is the sole repository of all powers, if magistrates have not fully conformed to their wishes, they are held accountable directly to them; the tribune is inviolable and sacred because the people have made him so. To put it in another way, if the magistrate does not fulfil his duty, he deprives himself of his office.

Ten years later, this principle found its legal formulation in a measure proposed by Gaius Gracchus. According to Plutarch, during his first tribunate Tiberius’ brother introduced a law ‘providing that if the people had deprived any magistrate of his office, such a magistrate should not be allowed to hold office a second time’.²⁷⁷ Although its aim was to avoid the use of tribunician *intercessio* to halt legislative measures unfavourable to the senate, its main principles were revived twenty years later in the *lex Cassia*. Passed in 104 BC, after years of military setbacks, the law aimed at strengthening the control of the people over the generals, reaffirming the people’s right to abrogate the power of a magistrate (or pro-magistrate) with or without the consent of the senate, and associating with it the mark of condemnation, that would, ultimately, prevent those convicted from running again for office.²⁷⁸ As Cicero reports, this law ‘consolidated the people’s courts (*populi iudicia firmavit*)’²⁷⁹ and Asconius comments that ‘L. Cassius Longinus [tribune of the plebs in 104 BC] . . . passed several laws with the view to lessening the power of the nobility (*ad minuendam nobilitatis potentiam*), among them this one, to the effect that a man whom the people had condemned, or whose power of command it had abrogated, should not be a member of the senate (*quem populus damnasset cuive imperium abrogasset in senatu ne esset*).’²⁸⁰ This law was not concerned with capital trials before the *comitia centuriata*, but rather with prosecutions before the more democratically structured *comitia tributa*. This assembly, having the power to decide over the exclusion from the senate, was thereby given a considerable political prominence. Nevertheless, however *popularis* this law might appear (even to Asconius), it was not necessarily advocated

²⁷⁶ Perhaps the case of Cinna, consul in 87 BC, whose *imperium* was abrogated by the senate as well as by the *comitia centuriata*, was advocated along the theoretical lines of this ‘optimat’ tradition. See Livy *Per.* 79; Vell. Pat. 2.20.3; App. *B. Civ.* 1.65–6.

²⁷⁷ Plut. *C. Gracch.* 4.1. Cf. Cic. *Mil.* 72 and *Leg.* 3.24.

²⁷⁸ On the relation between the Gracchan *rogatio* and the *lex Cassia* see Ferrary 1979: 98; on the nature of the Cassian law see Rotondi 1912: 327.

²⁷⁹ Cic. Asc. 78.1C = Cic. *Corn.* 1 50 Cr. ²⁸⁰ Asc. 78C.

in the name of direct popular rule. Its implementation may have been supported as a functional means of re-establishing a constitutional equilibrium that had been lost in favour of excessive aristocratic power. However, Asconius comments that L. Cassius had implemented the law chiefly 'on account of his personal quarrels with Q. Sulpicius who had been consul two years before, and whose power of command the people abrogated because of his failure against the Cimbri'.²⁸¹ This may lead us to infer that in the political debates of the time, a clear connection was drawn between on the one hand the notion of popular sovereignty as embodied in the supremacy of popular assembly and expressed in a conception of *maiestas*, and on the other the people's faculty to abrogate a power that, according to this line of thought, they themselves had conferred.²⁸²

Attestations of this intellectual tradition also show that it informed the debates (or at least Sallust's representation of the debates) directed in the 70s against Sulla's reforms. The consul Lepidus, in his attempt to instigate opposition to Sulla, states that 'The Roman people, a short while ago the ruler of nations, now stripped of power, repute and rights, without the power to administer its own affairs (*agitandi inops*), an object of contempt, does not even retain the rations of slaves.'²⁸³ In the current condition of slavery, to which Sulla has reduced them, the people are deprived of 'laws, courts, treasury, provinces, client-king, even [of] the power of life and death over our citizens [which now] are in the hands of one man'.²⁸⁴ Lepidus' (or, at least, Sallust's Lepidus') reference to the people's power, although it may be opportunistically directed to the re-establishment of the power of a group, rather than the implementation of a 'democratic' government, is an attestation of a distinct notion of liberty. Deprived of their power, glory and right, the citizens, exposed to illegal treatments, are enslaved.

It is significant that Lepidus' arguments find an echo in Catiline's words. Exhorting his followers to regain their liberty, Catiline is indeed inviting them to acquire a share of the influence, power, office and riches of which they are now bereft: 'Since the state fell under the jurisdiction and sway of a few powerful men (*res publica in paucorum potentium ius atque dicionem concessit*), it is always to them that kings and potentates are tributary and people and nations pay taxes. All the rest of us, energetic, able, nobles and

²⁸¹ Asc. 78C.

²⁸² See, for example, the trials against M. Junius Silanus (Asc. 80C) who had been accused of fighting against the Cimbri *iniussu populi* and against M. Aemilius Scaurus (Cic. *Deiot.* 31; Asc. 21C).

²⁸³ Sall. *Hist.* 1.48.11Mc (trans. by McGushin 1994). See McGushin 1994–2: *ad loc.* on the reading *agitandi* as 'to be occupied', 'to administer'.

²⁸⁴ Sall. *Hist.* 1.48.13Mc; cf. 1.48.2Mc.

commons, have made up the mob, without influence, without weight, and subservient to those to whom in a free state we should be an object of fear (*ceteri omnes, strenui, boni, nobiles atque ignobiles, volgus fuimus sine gratia, sine auctoritate, eis obnoxii, quibus, si res publica valeret, formidini essemus*).²⁸⁵

In the context of another political argument, this notion of liberty as political power is also articulated effectively in the speech of Macer reported in Sallust's *Historiae*. During his tribunate in 73 BC, agitating for the restoration of the tribunician powers hampered by Sulla, Macer laments the people's acquiescence in a condition of slavery imposed by Sulla.²⁸⁶ Urging them to recover their liberty, Macer illustrates two different conceptions of the value. Echoing the arguments adopted by Tiberius Gracchus, Macer rejects the notion that liberty consists solely of the right to vote, by which the people simply designate their masters: Sulla's successors 'have taken over the treasury, the armies, the kingdoms, and the provinces. They have made for themselves a stronghold from the spoils they have taken from you. Meantime, you, the multitude, submit yourself like sheep to their individual service and enjoyment. You have been stripped of every privilege which your forefathers left you, except your ballots, and by them you who once chose your defenders now choose your masters.'²⁸⁷

However, the people should not mistake liberty for simply the possession of the right to *provocatio*. Although of fundamental importance, this right, which guarantees the people's personal security, was not enough to establish the people's status of liberty: 'You have given up', says Macer, 'everything in exchange of your present slothfulness, thinking that you have plenty of freedom because your backs are spared, and you are allowed to go here and there by the grace of your rich masters.'²⁸⁸

Following the line of Gaius Gracchus, Macer urges the people not to acquiesce in a true condition of slavery which they may call peace, but rather gain for themselves power to administer their own property. The corn doles, which the *lex Terentia Cassia* established, fixed at five measures the value of people's liberty, 'an allowance,' Macer sarcastically comments 'not much greater than prison rations . . . But, even if the allowance were a generous one, what a mark of apathy it would be, since it was offered as

²⁸⁵ Sall. *Cat.* 20.7–9. See also *Hist.* 1.48.13Mc. Cf. Sall. *Cat.* 20.14 and Memmius' words, *Jug.* 31.20. On the similarities of the arguments see McGushin 1992: *ad loc.*

²⁸⁶ Sall. *Hist.* 3.34.1–2Mc. For Sullan legislation and sources see Broughton 1951–2: II 75.

²⁸⁷ Sall. *Hist.* 3.34.6Mc (trans. by McGushin 1994).

²⁸⁸ Sall. *Hist.* 3.34.26Mc (trans. by McGushin 1994).

the price of your slavery, to be deceived and actually to owe gratitude to your oppressors for your own property!’²⁸⁹

According to this argument, true liberty lies in the full re-establishment of the plebeian tribunate, a magistracy that should no longer be left in the state of an empty shell.²⁹⁰ Until the tribunate has recovered all its prerogatives, the people is deprived of any political power, and left in a condition of subjection, at the mercy of elite members, who solely fight for their own power. ‘In this civil unrest, although other motives were alleged, the real object of the conflict on both sides was to decide who should be your masters.’²⁹¹ However, once the tribunes of the plebs have regained their powers, the people will find at their disposal ‘a weapon fashioned by our ancestors to defend freedom’.²⁹² Exhorting them ‘not [to] change the names of things to suit [their] own cowardice and give to slavery the title of peace,’ Macer invites them to fight for their own liberty: ‘all the power is in your hands, citizens, and you are certainly well able to carry out or not carry out, in your own interests, the orders to which you are now submitting for the advantages of others’.²⁹³

Based on the conception of the tribune as the enactor of the people’s will, this understanding of the office as a *telum* was not only confined to the idea that the tribunes should make sure that the people’s wishes were legally implemented, but also that they acted as an institutional channel that enabled the people’s will. In this intellectual tradition, liberty was also identified with the power to rule. In the argument traditionally attributed to the supporters of democracy,²⁹⁴ true liberty can only exist in a democratic government, where, in order to be free, a citizen should not only possess the right to elect his own magistrates, which per se could lead simply to the choice of his own masters, but also the right to be elected himself. As Scipio claims in Cicero’s *de re publica*, in the democrats’ opinion, true liberty is gained only when the right to govern is shared amongst all the members of the citizen community, and it is only then that true political equality is obtained.²⁹⁵ In the narrative of Livy, it is to this notion of political equality that the plebeian spokesmen refer in their fight to obtain equal political

²⁸⁹ Sall. *Hist.* 3.34.19–20Mc (trans. by McGushin 1994). The so-called *lex Terentia Cassia frumentaria* distributed five *modii* of corn a month to a limited number of recipients in Rome. Cf. Cic. *II Verr.* 3.72, 3.163, 5.52; *Sest.* 55.

²⁹⁰ See above 53. ²⁹¹ Sall. *Hist.* 3.34.11Mc (trans. by McGushin 1994). Cf. *Hist.* 1.12Mc; *Cat.* 38.3.

²⁹² Sall. *Hist.* 3.34.12Mc (trans. by McGushin 1994). See also Chapter 2: 52ff.

²⁹³ Sall. *Hist.* 3.34.13–5Mc (trans. by McGushin 1994).

²⁹⁴ This is the traditional argument presented by the supporters of democracy as attested in the tradition of constitutional debate from Herodotus (3.80–2) to Dio Cassius (52.9).

²⁹⁵ Cic. *Rep.* 1.47. See above 119.

power, which, they claim, is tantamount to a struggle for *aequa libertas*. In Livy's account, often considered as a mirror of ideas contemporary to him, or at the very earliest a reflection of his first-century annalistic sources, the representatives of the plebeians argue that access to the consulship should be open to all men of ability for the purpose '*aequandae libertatis*'.²⁹⁶ Along similar lines, the denial of *imperium* to the plebeians could be portrayed as an act of violation of the *aequum ius*.²⁹⁷

Differing from the notion of *aequa libertas* as articulated in the 'optimates' tradition, according to which this principle consisted in equality with regard to the laws and thereby in a shared right to vote, but not to be voted on, the '*populares*' intellectual tradition considers such a condition necessary but not sufficient in order to achieve a true status of *libertas*.²⁹⁸ Although both lines of thought emphasise that to be free all members of the community ought to hold the same rights and should do so on the same basis, this intellectual tradition deems it essential to the attainment of this status that all members of the community, alongside being governed, hold the power to govern themselves.

From a purely conceptual point of view, this notion of *aequa libertas* is paradoxically not dissimilar from that held by Scipio Aemilianus. Claiming that from integrity springs worth and rank (*dignitas*), and from *dignitas* office and distinction (*honor*), from *honor* power (*imperium*), and from power *libertas*, Scipio appears to conceive of liberty not, like Cato, as a common status shared by all citizens and guaranteed by *aequae leges*, but rather as a much more radical notion predicated upon the power of command.²⁹⁹ In his opinion, it seems, a man is free not only when in a status characterised by the absence of domination, but also, and very importantly, when he himself is able to act on his own will. It follows that, from a strictly conceptual point of view, Scipio's notion is much closer to the conception expressed by the supporters of democracy in Cicero's *de re publica* than one might at first imagine. However, there is an important difference: whilst, according to this tradition, it is of vital importance that all members of the community are equally endowed with the same political rights (which involve both ruling and being ruled in

²⁹⁶ Livy 4.5.5. On *aequa libertas* see most recently Cogitore 2011: 64–9. Cf. Chapter 2: 65–7.

²⁹⁷ Livy 6.37.4. Cf. also Cic. *Leg.* 2. 29ff. ²⁹⁸ See Chapter 2: 65–7.

²⁹⁹ Scipio fr. 32 (Malcovati 1955: 134): '*ex innocentia nascitur dignitas, ex dignitate honor, ex honore imperium, ex imperio libertas*'. On Cato's fr. 252 (Malcovati 1955: 96) see Chapter 2: 67. On the importance of dominating as well as non-being dominated see above 76ff. Ando 2011: 68 suggests that the predication of *libertas* upon *imperium* conjoined express the concept of sovereignty not through hendiadys but through aggregation. For a comparison between these two fragments see Wirszubski 1950: 38.

turn), according to Scipio only those who hold *dignitas*, an idea that expresses the notion of individual merit, distinct, but at the same time closely linked to, that of wealth, will be entitled to achieve a true status of *libertas*.³⁰⁰

Cato, Scipio and the supporters of democracy all share a basic understanding of liberty as a status of non-domination. However, they diverge on the conception of equality they hold and the related conditions they regard as sufficient to protect the citizens from the arbitrary imposition of someone else's will upon them. Whilst for Cato the communally shared possession of civic and political rights, which include the right to vote, but not to be voted on, is sufficient to guarantee the citizens' liberty (*iure, lege libertate, re publica communiter uti oportet; gloria atque honore, quomodo sibi quisque struxit*), Scipio adds that, next to the absence of a condition of domination, citizens should also hold the power of dominating. If, as it seems most probable, his fragment refers to the role of an individual, rather than that of the *populus Romanus* as a whole, Scipio's conception of liberty requires not only the absence of something, but also the presence of something else, more precisely of the enjoyment of power, which, in his opinion, should be held only by those who could claim that *innocentia* and *dignitas* that, conducive to *honor*, will lead to power and, eventually, liberty.³⁰¹

I shall now turn my attention to the second claim that the supporters of democracy are reported to advance in Cicero's *de re publica*. Although support for the equal distribution of land did not necessarily imply the advancement of the popular assembly as the mainstay of political power, it seems that ideally a wealth equalisation by means of redistribution best embodied the notion of arithmetical equality – a notion, as identified in Greek thought (incidentally a thought critical to democracy), that was at the heart of the democratic form of government they supported.³⁰²

³⁰⁰ On *dignitas* see Hellegouarc'h 1963: 388–415, esp. 400–1.

³⁰¹ Richardson 2008: 53–4 regards the fragment as referring to the commonwealth rather than the individual. Ando 2011: 67–8 sees in Scipio's fragment a slippery elision of the boundary between individual and collective: 'for *dignitas*, *imperium*, and *libertas* are all properties of both individuals and communities, while public honor and power of command tend to be held by individuals but are legitimate only when granted by the collective'.

³⁰² Dion. Hal. *Ant. Rom.* 2.7.4 refers to Romulus' distribution of equal plot of land: 'he divided the land into thirty equal portions and assigned one of them to each *curia*'. It is interesting to observe that this equal distribution did not involve the individual citizens, but the unit of the *curiae*. This notion relates to a political system understood as a mixed constitution with the prevalence of the senate (Dion. Hal. *Ant. Rom.* 2.14; above 99–100); cf. *Ant. Rom.* 2.28. For an interesting hypothesis that ascribes this section to Varro as Dionysius' source see Wiseman 2009: 81–98. Gabba 1978: 250–8 argues that the most likely origin for this tradition is to be found in the *agrimensores*' techniques of the Republican period, which had been applied to the most ancient distribution of land during the foundation of Roman colonies and, therefore, were supposed to be also applicable

However, being basically resigned to the impossibility of implementing wealth redistribution, its supporters predicated equality of political rights as the indefeasible feature of their preferred form of government.³⁰³

In the *de officiis*, Cicero alludes to movements for a fairer, if not equal, distribution of wealth, which were attempted in the late Republic. He refers to those who 'pose as friends of the people (*populares*), and for that reason either attempt to have agrarian laws passed or think that money loaned should be remitted to the debtors, undermine the foundations of the commonwealth (*labefactant fundamenta rei publicae*)'.³⁰⁴

Famously, in 104 BC (?) the tribune L. Marcius Philippus, behaving, in Cicero's opinion, in the most irresponsible and dangerous manner, proposed a land distribution, whose exact content is unknown.³⁰⁵ 'In addressing the people,' Cicero reports in the *de officiis*, 'he said that "there were not in the commonwealth two thousand people who possessed anything". That speech deserves him the loss of civic rights,' Cicero comments, 'leaning to an equalization of property; and what greater plague than that could be conceived (*capitalis oratio est, ad aequationem bonorum pertinens; qua peste quae potest esse maior*)? Political communities and cities were constituted for this chief purpose, that men could hold on to what was theirs.'³⁰⁶

Discussing the communitarian land regime of the Germans, Caesar offers a series of comments and explanations which provide us with a window on how members of the late Republican elite may have discussed this and similar issues either showing admiration or scorn for peoples like the Germans. 'They do not pay much attention to agriculture, and a large portion of their food consists of milk, cheese, and flesh; nor has anyone a fixed quantity of land or his own individual limits; but the magistrates and the leading men each year apportion to the tribes and families, who have united together, as much land as, and in the place in which, they think proper, and the year after compel them to move elsewhere.'³⁰⁷ In explaining this communitarian system of land co-ownership, Caesar reverts

to the foundation of Rome. It is worth noting that nowhere in Book 2 of Cicero's *de republica* are there traces of egalitarian distribution of land by Romulus. This is, however, attested in texts of an antiquarian nature or in the *gromatici* books, which refer to the distribution of two *iugera* of land to all the king's followers: Varro *Rust.* 1.10.2; Plin. *HN* 18.7, 19.50; Siculus Flaccus 153 Lachmann; Festus 47.1–21.

³⁰³ Cic. *Rep.* 1.49.

³⁰⁴ Cic. *Off.* 2.78. Cf. the arguments presented by Rullus (Cic. *Leg. agr.* 1–3 *passim*) and Catiline (Sall. *Cat.* 20.12–13).

³⁰⁵ On the uncertain date of Marcius Philippus' tribunate see Broughton 1951: 1 560 and RE 14.2: 1562.57ff.

³⁰⁶ Cic. *Off.* 2.73. For an interpretation of this passage as referring to equal distribution of land see Dyck 1996: *ad loc.*

³⁰⁷ Caes. *B. Gall.* 6.22.

to arguments that had been adopted in Rome to denounce social inequality and which would later find an echo in Sallust's condemnation of social disparities in Rome.³⁰⁸ Alongside the preservation of their fierce bellicose nature, which might be diluted by concern for agriculture, Caesar states that this land regime prevents the excessive desire for large estates as well as the development of circumstances where the most powerful drive the weaker away from their possessions. More generally, it impedes the raising of the desire for wealth, from which divisions and discords derive. Finally, he reports that this system of land use also 'maintains the common people in a contented state of mind, when each sees his own means placed on an equality with [those of] the most powerful'.³⁰⁹ As scholars have pointed out, it seems legitimate to infer that Caesar is here applying interpretative categories deriving from the Roman experience to the Germanic reality, thereby hinting at arguments that may well have been adopted in support of an equalising distribution of land.³¹⁰

However, those who opposed land distribution did so in an essentially uniform fashion, regardless of the details of any scheme or its supposed beneficiaries; any form of wealth redistribution was immediately met with resilient hostility. As Cicero wrote in the *de officiis* (the most extensive defence of private property that has survived from the time of the late Republic), those who implement agrarian laws or propose abolition of debts undermine the foundations of the commonwealth (*fundamenta rei publicae*). By altering and ultimately destroying the timocratic structures at the basis of the Roman political system, those who implement these measures trample over the two fundamental principles of civic community, *concordia* and *aequitas*.³¹¹ 'First of all,' Cicero states, 'they are undermining harmony (*concordia*), which cannot exist when money is taken away from some and bestowed upon others; and secondly, they destroy fairness (*aequitas*), which is utterly subverted, if everyone may not keep that which is his. For, as I said above, it is the peculiar function of the commonwealth and the city to guarantee to every man the free and undisturbed control of his possessions . . . And how is it fair (*aequitas*) that a man who never had any should take possession of lands that had been owned for many years or even generations, and he who had them before should lose them?'³¹²

In Cicero's argument, even Sparta whose mixed constitution was highly regarded, collapsed under the weight of its leading men's greed. 'For to

³⁰⁸ Sall. *Jug.* 41; cf. Dion. Hal. *Ant. Rom.* 2.28. Gabba 1991: 174.

³⁰⁹ Caes. *B. Gall.* 6.22; cf. Tac. *Germ.* 26. ³¹⁰ See, for example, Gabba 1991: 174–5.

³¹¹ Cf. Cic. *Sest.* 103. ³¹² Cic. *Off.* 2.78–9; cf. 2.73.

use public affairs for one's profit is not only dishonourable, but criminal and wicked too. And so the oracle, which the Pythian Apollo uttered, that "Sparta should not fall from any other cause than avarice", seems to be a prophecy not only for the Spartans, but for all the wealthy people. There is nothing by which those in charge of public affairs can more easily endear themselves to the goodwill of the masses than by incorporating abstemiousness.³¹³

In Book 2, recurring to the example of Sparta, one of the most important historical precedents of wealth redistribution, Cicero presents the Lacedaemonian city as a warning example for Rome, with regards to both the mistreatment of the allies and the proposal of land distribution: a civic community, renowned for its splendid constitution, in the third century BC degenerated into civic discord.³¹⁴ In his attempt to gain popularity, Cicero claims implicitly, Agis, the king of Sparta, responsible for a radical land distribution, had implemented a series of measures that had marked the beginning of 'such great dissensions . . . that tyrants rose up, the *optimates* were exiled, and a political community that had been splendidly organised began to crumble'.³¹⁵

Agis IV of Sparta was renowned for having proposed a number of very revolutionary measures, whose common trait was equality.³¹⁶ Confronted by a dearth of manpower, reduced to poverty (of the meagre seven hundred citizens, only one hundred possessed property), he proposed the abolition of debts, and the division of the land of the Spartiates into equal plots to be assigned to each citizen, whose number had been increased by the inclusion of foreigners and *περίοικοι* (inhabitants of the towns dependent on Sparta) into the citizenry.

After Agis IV had been put to death, his reforming plan was taken up by Cleomenes III, who succeeded in implementing at least some of his measures, amongst which was land distribution. The tradition concerning Cleomenes III emphasises the ideological continuity, indeed the identity, between Agis and Cleomenes, mediated romantically by their successively shared wife.³¹⁷ Attributed to Phylarchus, whom both Polybius and Plutarch accuse of partiality towards Cleomenes and unfair hostility against Aratus, this tradition presents the two kings as champions of absolute equality.³¹⁸

³¹³ Cic. *Off.* 2.77; cf. Plut. *Inst. Lac.* 42.

³¹⁴ Cic. *Off.* 2.26. On the different readings to which the Spartan constitution had been subjected in antiquity and beyond see Rawson 1991a.

³¹⁵ Cic. *Off.* 2.80. ³¹⁶ Cartledge and Spawforth 1989: 38–58.

³¹⁷ Cartledge and Spawforth 1989: 49.

³¹⁸ Fuks 1962b: 161–6 = Fuks 1984 and Gabba 1957.

Their reforming programme was conceived as re-establishing the life of the Spartan body politic on equality.³¹⁹ Their programme was far-reaching. Attempting a return to the traditionally austere life of the past, they pursued equality of traditional discipline (ἀγωγή), equality of dress and manners, and through the re-establishment of the neglected συσσιτία (the ‘common mess’) they tried to revitalise another equalising component of Spartan discipline and regimen of life.³²⁰ ‘Equal education, equal discipline, a common mess, an equal mode of life – these were the social aspects of equality as envisaged by the reformers.’³²¹

However, their iconic reforms, which were responsible for their eventual downfall, concerned land distribution. Together with an increase in the number of citizens, Agis’ measure involved a definition of the boundaries of Spartan territory and its redivision into 4,500 allotments for both the old and new Spartiates.³²² This programme, which caused the collapse of Agis’ movement, was, however, successfully implemented by Cleomenes, who put a full redistribution of land into effect.³²³

In the literary tradition, their land reform was informed by the principle of equal distribution: involving an increase of the citizen body to remedy the widespread ὀλιγονθρωπία (paucity of men), their land reform was conceived as a measure to provide every citizen with a basic allotment.³²⁴ Affecting the whole territory, which had to be entirely redivided, their land distribution was conceived as providing an ‘equal lot for every citizen’.³²⁵

In the *de officiis*, Cicero not only refers to Agis as responsible for the downfall of the city–state which had been endowed with the best possible constitution, but also associates him, and indirectly also Cleomenes, with the Gracchi. Having highlighted the dissension caused by these Spartan reformers – which, Cicero implicitly claims, resulted in the Roman rule of the whole of Greece – Cicero asks rhetorically: ‘And what should I say of our own Gracchi, the sons of that excellent man Tiberius Gracchus, the grandsons of Africanus? Was it not strife over the agrarian issue that destroyed them?’³²⁶ This association, which Cicero may or may not have found in Panaetius (but which certainly derives from a derogatory tradition about the Spartan kings), creates the false impression for the contemporary reader that the Gracchi also enacted their land distribution in the name

³¹⁹ Plut. *Ag.* 7. 3–5; *Cleom.* 7.1, 18.2.

³²⁰ On ἀγωγή Plut. *Ag.* 4; *Cleom.* 2.1, 3.1–2; on dress and manners Plut. *Ag.* 8.4; *Cleom.* 11.2; on συσσιτία Plut. *Cleom.* 11.2. See also *Cleom.* 11.2 on the role of the Stoic philosopher Sphaerus as advisor to Cleomenes on these reforms.

³²¹ Fuks 1962b: 161. ³²² Plut. *Ag.* 8.1–3. ³²³ Plut. *Cleom.* 7.1, 11.1–2.

³²⁴ Plut. *Cleom.* 11.2. ³²⁵ Plut. *Cleom.* 7.1; cf. Pl. *Leg.* 5.737e.

³²⁶ Cic. *Off.* 2.80 (trans. by Griffin and Atkins 1991).

of arithmetical equality.³²⁷ This impression was strengthened further by Cicero's praise of Aratus and his attitude towards regime of land property.

According to Cicero, Aratus of Sicyon provided the perfect example of appropriate behaviour, which was informed by the principle of *aequitas*, rather than arithmetical equality.³²⁸

When in the third century BC Aratus liberated Sicyon, he recalled six hundred exiles who had been the wealthiest men of the city.³²⁹ However, when confronted with the issue of property and occupancy, he found it difficult to devise the best policy to adopt. On the one hand, Cicero tells us, he regarded it as *iniquissimum* not to assign land to the expropriated who had returned; however, on the other, he did not find it *aequum* either to subtract the land from those who had had it for fifty years or so, and had received it by right of inheritance, by purchase or by dower. He, therefore, devised a clever system in which those who willingly renounced to their property would receive financial compensation. Explaining to Ptolemy of Alexandria that 'he wished to restore constitutional liberty to his country', he secured from the king a sum of money which he used to compensate those who had decided to renounce to their property.³³⁰ 'As a result,' Cicero comments, 'harmony was preserved, and all parties went their way without a word of complaint.'³³¹

In comparing Aratus indirectly with the Gracchi and the Spartan kings (and more immediately with Caesar), Cicero is performing a very interesting intellectual operation.³³² Whilst he praises Aratus for having preserved *concordia* and upheld the principle of *aequitas*, he condemns the Spartan reformist kings and the Gracchi for having destroyed the foundations of the Roman commonwealth in the name of equality. However, whereas Aratus redistributed land as a consequence of the banishment of a party defeated in *στάσις* and concerned himself with the issue of compensation (which, making sure that none was deprived of its own, guaranteed that the principle of justice was upheld), the Gracchi were unfairly identified with the upholders of democratic equality.³³³ Whilst the Spartan kings, who spoke of the need for 'equality and community between citizens' and

³²⁷ On Tiberius' land reform in a context open to Greek influences and examples see Nicolet 1965. Cf. Valente 1956: 23–30 in favour of Panaetius as Cicero's source. Polybius (2.47.3) may perhaps have discussed this sort of example with Panaetius as well as adopted Aratus' memoirs as his source (from which he derives a strongly adverse attitude towards Agis and Cleomenes). See Fuks 1962a: 118–21, according to whom Cicero may be using Polybius as his source on Agis.

³²⁸ For a biography of Aratus see Walbank 1933. ³²⁹ Cic. *Off.* 2.81.

³³⁰ Holleaux 1906: 475 has proved Cicero wrong, suggesting quite convincingly the substitution of Antigonos for Ptolemy.

³³¹ Cic. *Off.* 2.82. ³³² Cic. *Off.* 2.83. ³³³ Fuks 1974: 51–81.

for Sparta as ‘city of equality’, were involved in a radical land redistribution, where ‘all land should be common property’, and their equalisation of Spartan society involved, most probably, also money and other forms of moveable property, the Gracchi, according to the preserved sources, never did anything of the sort.³³⁴ The latter, in fact, never dared to touch private property per se, but were always concerned with *ager publicus*, that is public land conquered by Rome which over time had been illegally occupied in defiance of previous agrarian laws.³³⁵ In addition, and in contrast with the Spartan programme, the Gracchan scheme does not seem to have been informed by the notion of equality of share. It established that each citizen should not possess more than 500 *iugera* of public land, which could be supplemented by 250 *iugera* for each child in the family. The land so recovered was meant to be redistributed in equal and inalienable lots to destitute citizens. This was hardly the same reform as the programme of the Spartan kings, who strived for social and economic equality.

Although the Gracchi are never represented in our sources as fighting for equality, by associating them with the Spartan reformers, Cicero could redescribe the tribunes’ behaviour as implicitly animated by the analogous principle of numerical equality, thereby shedding a negative light on their behaviour.

This opposition of political values embodied by Rome and Sparta emerges also from the speech that Livy, at the very end of the Republic, attributes to Nabis, the last king of Sparta. Attesting Cicero’s success in this operation, Livy has Nabis presenting Sparta as a commonwealth characterised by equality of wealth and rank (*per aequationem fortunae ac dignitatis*) in opposition to the Roman timocratic structure. In justifying his reforms, the increase in the number of citizens by manumission and the implementation of land distribution, Nabis describes the two political systems of Rome and Sparta in a way that must have sounded plausible to readers at the end of the Republic. ‘Do not weigh what is done in Sparta on the scales of your own laws and institutions. It is unnecessary to make a detailed comparison. You choose your cavalry and your infantry according to their census-ratings, and you desire that a few should excel in wealth and that the commons should be under their control; our lawgiver [Lycurgus] ordained that the state should not be in the hands of the few, whom you call the senate, and that no one order should predominate in the state, but

³³⁴ Plut. *Ag.* 7.3; *Cleom.* 7.1, 10.11. For a less radical interpretation of the Spartan reforms see Cartledge and Spawforth 1989: 45 and 52. See also Flower 1991.

³³⁵ Wiseman 2009: 38–41. On the issue of public land in the Roman Republic see most recently Roselaar 2010; on the specifics of the Gracchan laws see *ibid.*: 221–56.

he believed that by equalising wealth and rank (*per aequationem fortunae ac dignitatis*) it would come to pass that there would be many to bear arms for the country.³³⁶

Hence, in the words that Livy attributes to Nabis, the Spartan political system was a form of government which prided itself on the realisation of the *aequatio fortunae ac dignitatis*. This equalisation of wealth and rank is precisely the aspect of democracy that Scipio in Cicero's *de re publica* recognises as the most insurmountable defect of this form of government. Moreover, about twenty years or so after Cicero's composition of the *de officiis*,³³⁷ the presence of Nabis' speech in Livy suggests that the comparison between a democratic Sparta and a timocratic Rome, which associated the equalisation of wealth and rank with democracy, was a prominent feature of late Republican political discourse. In particular the Gracchi, who were already associated with the notion of popular sovereignty as directly exercised in popular assembly, could be misleadingly represented as advocating a numerical equality of material resources.

However, Cicero's efforts notwithstanding, the Gracchi did not apparently agitate for absolute, numerical, equality in Rome, but rather demanded a fairer redistribution of the empire's resources. In doing so, they claimed to be acting in the name of what was *aequum* and *iustum*.

A source widely regarded as well-informed, Florus, attests that those who proposed and supported land distributions did so by claiming that nothing 'could be fairer (*iustum*) than that the commons should receive from the senate what was really their own'.³³⁸ In this way, their argument continues, 'a people, who had been victorious over the nations and possessed the whole world, might not live banished from their own altars and hearths'. They adopted a similar argument in support of corn legislation, which, from their point of view, was *aequum*: 'what could be juster (*aequum*) than that a people in want should be maintained from its own treasury?'³³⁹ These arguments recall very closely those of Tiberius and Gaius Gracchus as presented in Plutarch as well as in Appian. The main argument runs along the lines that, because the land of the empire had been conquered by the whole Roman people, it followed that it belonged to the whole Roman people. As such, it was *iustum atque aequum* for everyone who took part in the conquest to receive an actual share of it.

As Appian reports, when the day for voting was close, Tiberius 'asked them whether it was not just to let the commons divide the common

³³⁶ Livy 34.31.16–18.

³³⁷ For an exhaustive discussion of the composition date of *de officiis* see Dyck 1996: 8–10.

³³⁸ Flor. 2.1.2. On Florus' reliability see, for example, Ferrary 1982: 752. ³³⁹ Flor. 2.1.3.

property'. According to this source, Tiberius also claimed that the most efficient defence of the commonwealth would be carried out by those who had a share in the advantages that the commonwealth itself could offer. Thus, he added that a citizen was more worthy of consideration than a slave, and that a man who served in the army was more useful than one who did not, and, ultimately, that one who had a share in the country was more likely to be devoted to the public interest.³⁴⁰ However, the people now lamented that they had been 'reduced from competence to extreme penury, and from that to childlessness, because they were unable to rear their offspring. They recounted the military services they had rendered, by which this very land had been acquired, and were angry that they should be robbed of their share of the common property.'³⁴¹

A very similar argument is found in Plutarch, who, when describing Tiberius' land reform as 'honourable and just', captures the essence of his argument in the famous lines: 'They fight and die to support others in wealth and luxury, and though they are styled masters of the world, they have not a single clod of earth that is their own.'³⁴²

This concomitance of arguments attests to the presence of this ideological tradition in the late Republic.³⁴³ Not only did Plutarch, Appian and Florus adopt a late Republican source, but we find also very similar arguments deployed by Macer in his speech reported in Sallust's *Historiae*.³⁴⁴

In urging the people to fight for the restitution of all tribunician rights, Macer is reported to have stated that 'I will not recommend war or secession, but simply that you should refuse any longer to shed your blood for them. Let them hold and exercise their commands in their own way, let them seek triumphs, let them, with those ancestral portraits of theirs, harry Mithridates, Sertorius, and what is left of the exiles, but let those who have no share in profits be free from the danger and the toil.'³⁴⁵ The people should demand a share of what they themselves have conquered: 'we fight and conquer for the benefit of the few; whatever happens, the plebs is treated as the conquered. This will be more so as the days go by, so long as they make greater efforts to retain their mastery than you do to regain your freedom.'³⁴⁶

However, those who opposed the implementation of agrarian distributions, which always aroused indignation and resistance (irrespective of the

³⁴⁰ App. *B. Civ.* 1.11. ³⁴¹ App. *B. Civ.* 1.10. ³⁴² Plut. *Ti. Gracch.* 9.5. See above 126ff.

³⁴³ Nicolet 1965 argues for the existence of this line of reasoning in the second century BC.

³⁴⁴ Sordi 1978 identifies the common source for Plutarch and Appian as Asinius Pollio. In the case of Florus, it is most likely Livy.

³⁴⁵ Sall. *Hist.* 3.34.17–18Mc (trans. by McGushin 1994).

³⁴⁶ Sall. *Hist.* 3.34.28Mc (trans. by McGushin 1994).

beneficiaries or how well thought through the proposals had been) claimed that these measures had only an appearance of justice. As Florus reports, the tribunes of the plebs, 'under the pretence of protecting the common people, courted popular support and favour by legislation for the distribution of lands and corn and the disposal of judicial power. All these measures had some appearance of justice (*inerat omnibus species aequitatis*).'³⁴⁷

Opponents of these measures claimed that it could not be fair that 'the purchase of corn was a drain on the treasury, the very life-blood of the commowealth', as it could not be fair that in order to restore common people to the land, others who were occupying it would be dispossessed. These persons too were part of the Roman people, and 'held estates bequeathed to them by their forefathers under the quasi-legal title of prescriptive right'.³⁴⁸ They claimed, as Appian reports, that 'they had paid the price of the land to their neighbours. Were they to lose the money with their land? Others said that the graves of their ancestors were in the ground, which had been allotted to them in the division of their fathers' estates. Others said that their wives' dowries had been expended on the estates, or that the land had been given to their own daughters as dowry. Money-lenders could show loans made on this security. All kinds of wailing and expressions of indignation were heard at once.'³⁴⁹

The same second-century argument against Tiberius Gracchus is presented by Cicero, who criticises those of his contemporaries who wish to pose as friends of the people (*populares*). 'For that reason either [they] attempt to have agrarian laws passed, in order that the occupants may be driven out of their homes, or propose that money loaned should be remitted to the borrowers.'³⁵⁰ In so doing, they undermine the foundations of the commonwealth, destroy its harmony (*concordia*), 'which cannot exist when money is taken away from one party and bestowed upon another', and eliminate equity (*aequitas*), 'which is utterly subverted, if everyone may not keep that which is his'.

'And how is it fair (*aequitas*),' Cicero asks, 'that a man who never had any property should take possession of lands that had been occupied for many years or even generations, and that he who had them before should lose possession of them? . . . "Let them live in their neighbour's house rent-free." Why so? In order that, when I have bought, built, kept up, and spent my money upon a place, you may without my consent enjoy what belongs to me? What else is that but to rob one man of what belongs to him and to give to another what does not belong to him? And what is the meaning

³⁴⁷ Flor. 2.1.³⁴⁸ Flor. 2.1.7.³⁴⁹ App. *B. Civ.* 1.10.39.³⁵⁰ Cic. *Off.* 2.78.

of an abolition of debts, except that you buy a farm with my money; that you have the farm, and I have not my money?³⁵¹

As Cicero's praise of Aratus shows, and Florus perceptively attests, then, both those who proposed land distribution and those who fiercely opposed them claimed to be acting in the name of *aequitas*.³⁵²

In the *de officiis*, this notion was also the subject of distinct philosophical interpretations, which were applied to discuss issues surrounding property transactions.³⁵³ Within his discussion of the relation between the *honestum* and the *utile*, Cicero presents six cases of the transfer of property which involve either issues of concealment (*reticentia*) or fraud (*dolus malus*). These are circumstances where *utile* and *honestum*, benefit and honourableness, are not so obviously at odds with each other, and deserve a closer analysis.

The first case discussed concerns a merchant who, in a time of famine, sells his grain on the island of Rhodes at a very high price without revealing that other grain-ships are en route to the island. The second case concerns the seller of a house, who decides not to share with potential buyers the serious problems of sanitation that affect the property. The question is whether a *vir bonus*, that is a virtuous man, should share this knowledge with those interested in the purchase: 'We wonder about the deliberations and considerations of a man who would not conceal the facts from the Rhodians if he thought it dishonourable, but is in doubt whether it is dishonourable.'³⁵⁴

Cicero presents the discussion in the form *in utramque partem*, where Diogenes of Babylon, Chrysippus' pupil and Panaetius' teacher, is portrayed as a supporter of the individual's interest within the letter of the law, and Antipater of Tarsus, Diogenes' pupil, as an advocate of the full disclosure of relevant information regardless of personal advantage.³⁵⁵

Although rivalries between the alternative views held by Diogenes and Antipater are suggested by the reference to their followers as Diogenists and Antipatristes,³⁵⁶ there is a general consensus amongst scholars that the debate embedded in the *de officiis* represents at best the gist of the disagreement

³⁵¹ Cic. *Off.* 2.79–83.

³⁵² See Pohlenz 1934: 119–22: those who supported agrarian distributions recalled the legal formality of the agrarian laws (appealing to *ius*), as opposed to the those who opposed them, who appealed to the notion of *aequitas* (Cic. *Off.* 2.81, 2.83; Flor. 2.1.7).

³⁵³ Pohlenz 1948–9: 1 264, Smuts 1958: 106ff. esp. 115, Nicolet 1965 and Hadot 1970.

³⁵⁴ Cic. *Off.* 3.50 (trans. by Griffin and Atkins 1991).

³⁵⁵ Cic. *Off.* 3.89. On Diogenes *RE* 5.1 (n.45): 773–6 and on Antipater see *RE* 1.2 (n.26): 2515–16.

³⁵⁶ Ath. 5.186A admittedly, however, in connection with banquets. For discussion see Ferrary 1988a: 449–64.

between the two philosophers, if not being Cicero's own invention.³⁵⁷ As Dyck points out, ultimately 'Diogenes and Antipater are essentially conveniences used by Cicero for his own purposes.'³⁵⁸

By highlighting the contours of their divergence, Cicero could show at least two different ways in which the principle of *aequitas* could be philosophically conceived and applied to the transition of property. Although the protagonists of this debate lived in the second century BC and were contemporaries of the Gracchi, by applying their conceptual categories to discuss cases rooted in the Roman life of the first century BC (such as, for example, the case of Gaius Canius and the Sicilian house or that of Publius Calpurnius Lanarius and the house on the Caelian hill), Cicero shows their relevance to contemporary concerns about property.

What distinguishes the views held by the two Stoics is a different way of conceptualising the relation between the interest of the individual and the interest of the community. Both Diogenes and Antipater conceive *societas hominum coniunctioque* as an aggregate of individual interests (*communis utilitas* or *utilitas omnium*), but differ on the relation of the part to the whole.³⁵⁹ For Diogenes, 'The seller ought to declare any defects in so far as civil law requires, and to do everything else without trickery; but, since he has goods to sell, he ought to want to sell at the best price.'³⁶⁰ Antipater replied that 'It is your duty to consider the interests of men and serve human fellowship; you were born under this law, and you have these principles of nature which you ought to obey and to follow, to the effect that your benefit shall be the common benefit, and, conversely, the common benefit shall be yours.'³⁶¹ Antipater's point is that the private and collective interest coincides, whilst Diogenes claims that private interest is the core from which common interest springs.³⁶²

In defending the primacy of private interest, Diogenes underlines that there is a substantial difference between concealment and simply keeping

³⁵⁷ Annas 1989: 155 suggests that Cicero himself inserted the debate on the basis of his knowledge of Diogenes' and Antipater's works (cf. Cic. *Fin.* 1.6). Dyck 1996: 557 very convincingly argues for Hecato as Cicero's source. The importance of Hecato for Cicero's discussion in Book 3 was first highlighted by Hirzel 1877–83: II 726 and 733–4. See Schofield 1999: 164 for the most subtle view: 'if the views of Diogenes and Antipater on the same questions were divergent, there was philosophical advantage in highlighting or sharpening the contours of the divergence by exhibiting it as a dialectical exchange, even if the protagonists did not conceive it'.

³⁵⁸ Dyck 1996: 559.

³⁵⁹ See Gabba 1979: 122–4, Wood 1988: 124ff. and Atkins 1990. Long 2006: esp. 326ff. is one of the most illuminating discussions of Cicero's conception of private property.

³⁶⁰ Cic. *Off.* 3.51 (trans. by Griffin and Atkins 1991).

³⁶¹ Cic. *Off.* 3.52 (trans. by Griffin and Atkins 1991).

³⁶² Annas 1989: 158ff., followed by Long 2006: 329, n.33, argues that the debate is constructed in such a way that Diogenes is interested in legal obligations and corresponding legal rights, whilst Antipater is interested in moral duties. *Contra* Schofield 1995b.

silent, and argues that it is not necessary to reveal everything that might be beneficial to the other to know. 'Even if I am not telling you about it, I am not concealing from you the nature of the gods, or the highest good; yet to know these things would benefit you more than to know that the cheap price of wheat was down.'³⁶³

The necessity of revealing to the other party anything that may be beneficial to him to know does actually exist, since, Antipater replies, men are associated together in fellowship by nature.

Diogenes does not deny the existence of such a fellowship, but rather questions the role that is reserved within it for the interests of individuals. Working on the assumption that men are bound together by Nature, Diogenes firmly reclaims the centrality of private interests. 'I remember [that men are bound together in fellowship by nature],' he replies, 'but is that fellowship of a kind that nothing belongs to any one person? If that is so, then nothing can be sold at all, but must be given.'³⁶⁴

Both Antipater and Diogenes seem to share the same starting point: as Long has cogently argued, for the Stoic the notion of οἰκείωσις, mutual appropriation between human beings, which is something natural, drives men to recognise someone else's property and to pursue the common good.³⁶⁵ Moreover, although in the canonical definition of justice – the 'disposition to assign to each his share according to worth' – there is no reference to the criterion of property distribution, as Schofield has shown, later Hellenistic thinking about property claims that justice is based on two maxims: first, 'that no man should harm another, unless provoked by wrong; and the next that men should use common possessions as common, private property as their own'.³⁶⁶

Since 'no property is private by nature, but rather by long occupation (as in the case of those who a long time ago moved into some empty property), or by victory (as in the case of those who took it in war), or by law, by settlement, by agreement, or by lot . . . [it follows that] what becomes each man's own comes from what had in nature been common, each man should retain possession of what has fallen to him. If anyone else seeks any of it for himself, he will be violating the law of human fellowship.'³⁶⁷

³⁶³ Cic. *Off.* 3.52 (trans. by Griffin and Atkins 1991).

³⁶⁴ Cic. *Off.* 3.53 (trans. by Griffin and Atkins 1991).

³⁶⁵ Long 2006: 351–7. For an account of the Stoic concept, see Pembroke 1971 and the texts cited in Long 2006: 351 n.36.

³⁶⁶ Cic. *Off.* 1.20. For the Stoic definition of justice see Stob. *Ecl.* 2.59.9.20. See Atkins 1990 and Schofield 1999: 173.

³⁶⁷ Cic. *Off.* 1.21 (trans. by Griffin and Atkins 1991). On this passage see Costa 1927: 91–3 and Watson 1968: 70–2. Cf. Cic. *Off.* 1.51, 2.73ff., 3.42.

This line of argument may be also found in the rather compressed analogy of the theatre attributed to Chrysippus: 'Just as, though the theatre is something communal, it is correct to say that the seat each person occupies is his, so in civil society or the world, while these are communal, no principle of justice opposes each person's owning what is his individual property.'³⁶⁸

As Long has noted, this passage seems to suggest the defence of the individual's right to occupy a seat as the right to possess one's own property. Although the reference to the communality of the theatre seat indicates that anyone, in principle, could occupy a seat, it also implicitly suggests that no more than one person could do so at any one time. If Long's reading is correct, it follows that the shared possession of the world, as implicit in the law of Nature, is 'more like a right of access or opportunity than a title of personal ownership'.³⁶⁹

Not only was it the main duty of politicians to govern in such a way as never to disturb private property, as this would have been unjust, but it was also to support and protect such a property. Looking after one's own interests was indeed a moral duty towards that universal human fellowship which both Diogenes and Antipater recognise as a fundamental feature of the human condition. In the *de officiis*, Cicero reports the claim of Hecaton of Rhodes, Panaetius' pupil, that 'it is the duty of a wise man, without acting contrary to customs, laws, and established practices (*contra mores, leges, instituta*), to take care of his personal wealth. For we do not wish to be rich for our own sake alone, but for our children, our relatives, our friends, and most of all for the commonwealth. The resources and the riches of individuals are the wealth of the city . . . for Hecaton,' Cicero continues, 'declares that he would refrain from doing for his own profit only what is not permitted.'³⁷⁰

Thus, the defence of one's own interests is an essential means by which to promote the interests of others, and especially of the community as a whole. Not only is such a promotion justified by the social glue implicit in Panaetius' theory of justice, but also it is reinforced by Hecaton's casting of the relation between the interest of the individual and that of the community.

Hecaton's point, which, as Schofield has observed, is truly about the long-term benefit to the city generated by the existence of persons who

³⁶⁸ Cic. *Fin.* 3.67 = T20 (Long and Sedley). Waldron 1988: 154 considers the passage Ciceronian; Erskine 1990: 105–10. attributes it to Stoics later than Chrysippus.

³⁶⁹ Long 2006: 351.

³⁷⁰ Cic. *Off.* 3.63 (trans. by Griffin and Atkins 1991). Hadot 1970: 172–3 and Schofield 1999: 175. *Contra* Long 2006: 343 associates Hecaton's view expressed here to Antipater's understanding of the relation between the interests of the individual and that of the community.

successfully pursue their own immediate interests, supports the argument of Diogenes.³⁷¹

As Diogenes replies to Antipater, 'What is more foolish than for a seller to recount the faults of the very thing he is selling? What could be more absurd than for the auctioneer to say, "I am selling an unsanitary house"?'³⁷² According to this line of argument, the Stoics did not regard the pursuit of private interests as immoral; on the contrary, they favoured it, provided that it was pursued without causing any harm to other fellow human beings. As Cicero states, reporting the view of Chrysippus, 'We are not to neglect benefits to ourselves and surrender them to others when we ourselves need them. Rather, each should attend to what benefits him himself, so far as may be done without injustice to another. Among Chrysippus' many neat remarks was the following: "When a man runs in the stadium he ought to struggle and strive with all his might to be victorious, but he ought not to trip his fellow-competitor or to push him over. Similarly in life: it is not unfair for anyone to seek whatever may be useful to him, but it is not just to steal from another."³⁷³ Looking for one's own benefit, even by competing for its promotion, was morally honourable, claimed Chrysippus and after him Diogenes, as long as it was done with the respect of each other's rights to possess what each legitimately owns.

On the other hand, as Cicero represented the debate, the view of Antipater did radically differ from that of Diogenes. However, although he did not expressly deny the existence of private property, Antipater claimed that the interest of the individual should come before the interest of the community.

As mentioned above, advancing the claim that, in any business transaction, one should always disclose any information that may be useful to the other party, Antipater overrules the role that contingent positive laws play in governing human relations, and reclaims the centrality of human fellowship. 'It is your duty,' he states in reply to Diogenes, 'to consider the interests of your fellow men and serve society. You were brought into the world under these conditions, and have these inborn principles which you are in duty bound to obey and follow.'³⁷⁴ Cicero himself further elaborates this point by claiming that withholding information 'is, however, forbidden by the law of nature. For there is a fellowship that is extremely widespread, shared by all with all . . . a closer one exists among those of the same nation, and one more intimate still among those of the same

³⁷¹ Schofield 1999: 175. ³⁷² Cic. *Off.* 3.55 (trans. by Griffin and Atkins 1991).

³⁷³ Cic. *Off.* 3.42 (trans. by Griffin and Atkins 1991). ³⁷⁴ Cic. *Off.* 3.52.

city . . . we, however, do not have the firm and lifelike figure of true law and genuine justice: we make use of shadows and sketches!’³⁷⁵ Ultimately, he summarises, ‘since nature is the source of law, what is in accordance with nature is that no one should act so as to exploit another’s ignorance’.³⁷⁶

Cicero shares with Antipater the fundamental view that, given that all men are bound together in fellowship, ‘your interest’ as Antipater exhorts Diogenes ‘shall be the interest of the community and conversely that the interest of the community shall be your interest as well (*utilitas tua communis sit utilitas vicissimque communis utilitas tua sit*)’.³⁷⁷

In Cicero’s words, ‘All men should have this one object, that the benefit of each individual and the benefit of all together should be the same (*eadem sit utilitas unius cuiusque et universorum*). If anyone arrogates it to himself, all human intercourse will be dissolved. Further: if nature prescribes that a human being should want to consider the interest of another human being, whoever he is, simply because he is a human being, it follows, in accordance with the same nature, that there is an interest which is common to all. But if so, we are all subject to one and the same law of nature; and, if this too is so, we are certainly forbidden by nature’s law from wronging another. But the first is true; therefore the last is true.’³⁷⁸

The crucial point is that this Stoic identification of individual and communal interests could have been interpreted as providing the philosophical basis for a form of egalitarianism. If the interests of the individual coincide with the interests of the community, it would be plausible to infer that each member of society is entitled to no larger share of interests, however these are identified (such as, for example, wealth, social privilege or even liberty), than anyone else in the community.³⁷⁹ The Stoic ideas concerning ‘the community of reason and law, and the application of these ideas to mutual interests and justice, are compatible with radical communism, minimal private property, and minimal commercial activity. Or, to put it still more strongly, if the world is the common possession of all, should it

³⁷⁵ Cic. *Off.* 3.69 (trans. by Griffin and Atkins 1991); cf. 1.50–8.

³⁷⁶ Cic. *Off.* 3.72 (trans. by Griffin and Atkins 1991). ³⁷⁷ Cic. *Off.* 3.52.

³⁷⁸ Cic. *Off.* 3.26–7 (trans. by Griffin and Atkins 1991). On the association of this passage with Antipater see Schofield 1995b: 199–201.

³⁷⁹ Egalitarian elements in Stoic doctrine: SVF III 253–4: nobody is by nature inferior to another and does not belong by nature to a close social class. SVF I 262, III 349, 350, 354: the only differences amongst men result from different degrees of natural disposition to reason, but everyone is endowed of reason. SVF III 371 = Cic. *Fin.* 3.67 (cf. *Off.* 1.21): from men’s equality based on nature it follows that there is no private property, and if distributions take place, they should be equal. For the most compelling summary see Long 2007: 241–61 esp. 243: ‘Stoic conceptions of the common identity of human beings in virtue of rationality exclude any grounds for ranking men’s innate aptitudes ahead as ethically superior to another on the basis of wealth or social position or race.’

not follow that everyone should own everything or at least an equal share of everything?³⁸⁰

Antipater's argument in the debate, as it is reproduced by Cicero, testifies to a potentially democratic interpretation of the relation between individual and collective interest in late Republican Rome and its possible adaptation to the interpretation of Roman social dynamics. Certainly, as the casuistry of the *de officiis* shows, this fashion of reasoning could be applied, to a certain extent and with due variation, to Roman businesses involving property transactions. In Cicero's *de re publica*, composed more or less ten years before the *de officiis*, the supporters of democracy had been reported as praising it as the best form of government since in a democracy 'everyone has the same interest: from a variety of interests, when different things are advantageous to different people, discord arises'.³⁸¹ Hence, although Antipater's identification of individual and communal interests is very general and could be interpreted in opposing ways,³⁸² it is plausible to assume that, regardless of Antipater's actual claims, this line of argument in late Republican Rome could have been interpreted in egalitarian terms and even adopted to provide politicians with a philosophically informed language in support of the redistribution of land.

As was known in antiquity, Antipater of Tarsus had been a friend of Blossius of Cumae, whom he held in such a high regard as to dedicate his work to him.³⁸³ Blossius was a philosopher from Cumae, in South Italy, who was considered by ancient writers to have exercised a major influence on Tiberius Gracchus, to the extent that Cicero could describe him as a *dux*, rather than a *comes*, of Tiberius' *temeritas*.³⁸⁴ Not much is known about him, but there are a few revealing anecdotes. On the day that Tiberius lost his life, Blossius accompanied him to the Capitol. On the way, when confronted by such unfavourable omens that even the boldest of Tiberius' followers paused, Blossius exhorted him by referring to the notion of popular sovereignty to which magistrates should be subservient: 'It would be a shame and a great disgrace,' he is reported to have said, 'if Tiberius, a son of Gracchus, a grandson of Scipio Africanus, and a champion of the Roman people, for fear of a raven should refuse to obey the summons of his fellow citizens.'³⁸⁵ Blossius adopted similar arguments to justify his behaviour before the consuls after Tiberius' death: 'He admitted that he had done everything at the bidding of Tiberius. Then Nasica said to him,

³⁸⁰ Long 2006: 349. ³⁸¹ Cic. *Rep.* 1.49.

³⁸² Long 2006: 326–34. See also Schofield 1995b: 199–201 and 1999: 160–77 and Erskine 1990: 152–8.

³⁸³ Hadot 1970: 138.

³⁸⁴ Cic. *Amic.* 37; Plut. *Ti. Gracch.* 8.4–5; Val. Max. 4.7.1. ³⁸⁵ Plut. *Ti. Gracch.* 17.4.

“What, then, if Tiberius had ordered you to set fire to the Capitol?” Blossius at first replied that Tiberius would not have given such an order; but when the same question was put to him often and by many persons, he said: “If such a man as Tiberius had ordered such a thing, it would also have been right for me to do it; for Tiberius would not have given such an order if it had not been for the interest of the people.”³⁸⁶

Once he was acquitted, Blossius went to Asia to collaborate with Aristonicus, who had attempted to set up the utopian Heliopolis, a community characterised by the absence of slavery and of all social differences.³⁸⁷ After Aristonicus’ project failed, according to Plutarch, he committed suicide.

Blossius’ influence on Tiberius Gracchus has been the subject of great scholarly interest. He has been seen in various different roles, from being the source of inspiration, informing Tiberius’ speeches and actions of Stoic tenets, to the executor of orders whose role had been amplified by a negative historiographical tradition, or even the importer of democratic Campanian ideals nurtured against Rome.³⁸⁸ However one views the relationship between Blossius and Tiberius Gracchus, it seems plausible to suggest that the former, and indirectly perhaps also Antipater, could have provided the Roman politician with democratic concepts with which to articulate and justify his proposal for land reform. Ultimately, they provided Tiberius primarily, but also Roman politicians in general, with ideas that could inform the way in which they talked and thought about their courses of action.

Thus, it is plausible to think that this egalitarian line of reasoning, although perhaps not fully proper to Antipater’s thinking, informed Roman political discourse on land distribution. Not only in the second century BC did the Gracchi advocate their reforms in the name of *aequitas*, but, as we have seen, this way of thinking also circulated in the first century, when it continued to inform conceptions of private and communal interests.

If in Cicero’s *de officiis* the Spartan reformers and the Gracchi could be inaccurately associated with one another, and presented as destroyers of that *aequitas* upheld successfully by Aratus, in the debate between Diogenes and Antipater which recalled the issues raised by the Gracchi’s reforms, it is possible to identify the existence of a different conception of this

³⁸⁶ Plut. *Ti. Gracch.* 20.4. The same episode is reported with some variations by Cic. *Amic.* 37 (the question is asked by Laelius; in Plutarch by Nasica) and Val. Max. 4.7.1.

³⁸⁷ Africa 1961; Vavrinek 1975; Gruen 1984: 595–603 and Dawson 1992: 238 with n.32. Cf. Strabo 14.1.38.

³⁸⁸ On Blossius as providing Stoic inspiration to Tiberius’ reform see Taeger 1928: 16ff. (*contra* Gelzer 1929: 300); on a more reduced role to be attributed to a negative historiography see Garbarino 1973: II 445–58; on the role of Campanian democratic tradition see Dudley 1941: 94–9. See also Nicolet 1965.

value. Associated with a democratic fashion of thinking, this conception of *aequitas* was based on the notion that each individual had the right to an equal share, and seemed to be akin to that arithmetical equality which was fundamental for the centrality of the popular assembly. By embedding this debate over competing notions of *aequitas* in a historical Roman context, Cicero reproduced and gave a contemporary resonance to arguments which in the constitutional discussion of the *de republica* marked the distinction between democracy and aristocracy.³⁸⁹

In this setting, Cicero's rather puzzling position in the debate between Diogenes and Antipater may appear in a different light.³⁹⁰ Rather than following Diogenes in his championing of private interest over that of the community, as one might expect, Cicero embraces Antipater's idea concerning the communality of interest. However, in so doing, he makes an interesting move: from the partnership in the community of men it is deduced that the interest that everyone shares is that of preserving what everyone happens to own. Ultimately, this legitimates the pursuit of private interests.³⁹¹ Aware of the egalitarian potential present in this strand of thought, Cicero adopts Antipater's position as a starting point, in order to detract its subversive potential and connect it firmly with a strenuous defence of private property.

After the first two cases, considered to be of Panaetian derivation, Cicero discusses another five centred on Roman life: the case of the *equus* Gaius Canius tricked by a Sicilian banker, two sales of houses in Rome (the first involving Calpurnius Lanarius and the second Sergius Orata), the sale of slaves, and the purchase of a farm by Quintus Mucius Scaevola, the pontifex maximus (consul 82 BC). In the last of these, Quintus paid more than the asking price for the farm he wished to purchase, as he was aware of its real value.³⁹² As Dyck has observed, the case raises the conflict between two distinct principles: on the one hand, the purchaser's obligation to truthfulness, on the other, his duty to close the best possible monetary deal in order to benefit his children, relatives and friends.³⁹³ Criticised by Hecaton, Quintus Mucius' behaviour is equivalent to the declaration of the superiority of *aequitas* over the mechanical application of the law, which, ultimately, may induce the perpetration of an unjust act.³⁹⁴ In line with Cato's verdict (as reported by Cicero), according to which 'it was essential to good faith (*bona fides*) that any defect known to the vendor must be made known to the purchaser',³⁹⁵ in Cicero's *de officiis* Quintus Mucius is reported to have said that the greatest force resided in all the actions to

³⁸⁹ Cic. *Rep.* 1.47–52.

³⁹⁰ Cic. *Off.* 3.57.

³⁹¹ Long 2006: 326ff.

³⁹² Cic. *Off.* 3.62.

³⁹³ Dyck 1996: *ad loc.*

³⁹⁴ Cic. *Off.* 3.61–2.

³⁹⁵ Cic. *Off.* 3.67.

which the words *ex fide bona* were added: ‘Quintus Scaevola, the pontifex maximus, used to say that there was the greatest force in all those judgments to which the formula was appended “as good faith requires”; and he held that the expression “good faith” had a very wide application, for it was employed in guardianships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting – in all those things of which the fellowship of life was made.’³⁹⁶

Quintus’ interest in articulations of human social relations was so strong that he is reported to have been involved in a dispute with Servius Sulpicius about the criteria according to which shares of profit and losses should be apportioned in *societates*. As Gaius tells us, ‘there has been a great dispute as to whether a partnership is possible on the terms that one of the partners should have a larger share in profits than in losses. Quintus Mucius considered this to be against the nature of partnership (*contra naturam societatis esse censuit*),³⁹⁷ but Servius Sulpicius, whose opinion has prevailed, held that not only is partnership possible on these terms, but even on the terms that one partner shall bear no share of losses and yet have a share in profits, on the supposition that his services are considered so valuable that it is fair that he should be admitted to partnership on such terms (*si modo opera eius tam pretiosa uideatur ut aequum sit eum cum hac pactione in societatem admitti*). For it is settled law that a partnership agreement may provide that one partner should, and the other should not, bring in money, and yet that the profits should be shared; for a man’s services are often as valuable as money (*saepe enim opera alicuius pro pecunia ualet*).’³⁹⁸

In this dispute, the issue at stake appears to be the value to be assigned to *opera*, as opposed to material benefits as contributions on the part of each partner. However, the two jurists seem to be in agreement, at least as represented in this discussion, about the fundamental principle that should inform a *societas*: there should be a direct and geometrically proportioned correspondence between profits, losses and contributions; their disagreement centred on the value-judgement attached to each form of contribution.³⁹⁹

Quintus Mucius performed a significant intellectual move in his analysis of *societas*. As Schiavone highlights, Quintus was the first Roman thinker

³⁹⁶ Cic. *Off.* 3.70. On Quintus Mucius and the role of *bona fides* see Talamanca 1981: 24 and 327 n.87 and Watson 1974: 156 and n.4. On the notion of *bona fides* and its evolution see Lombardi 1961.

³⁹⁷ For the emendation of (*naturam societatis*) see Schiavone 1987: 67 n.109.

³⁹⁸ Gai. *Inst.* 3.149 (trans. by de Zulueta 1946).

³⁹⁹ *Contra* Hadot 1970 who interprets the correspondence between profits and losses as an indication of arithmetical equality, and also underlines Quintus Mucius’ reference to the correspondence of *societas* with Nature.

to have elaborated the abstract notion of *societas*.⁴⁰⁰ As attested by the fragments at integration of the Veronese manuscript of Gaius, Quintus developed the idea of *societas omnium bonorum* from a very archaic form of partnership, the *consortium* or *societas ercto non cito*.⁴⁰¹ As Gaius explains, there were two *genera societatis*: the first, 'which is formed by simple consent (*nudo consensu contrahitur*), is *iuris gentium* and thus obtains by natural reason among all men (*naturali ratione consistit*)'.⁴⁰² The second is 'another kind of partnership peculiar to Roman citizens (*aliud genus societatis proprium civium Romanorum*). For at one time, when a *paterfamilias* died, there was between his *sui heredes* a certain partnership at once of positive and of natural law, which was called *ercto non cito*, meaning undivided ownership: for *erctum* means ownership, whence the term *erus* for owner, while *ciere* means to divide, whence the words *caedere* and *secare*'.⁴⁰³

Although the extent and nature of Quintus' elaboration is the subject of scholarly dispute,⁴⁰⁴ what can be inferred from Gaius is that in the late Republic there were two distinct ways of conceiving the structured organisation of human relations, and that Quintus Mucius was familiar with both.

In the first place, *societas* as 'an agreement to contribute property or work or both to the prosecution of a common aim'⁴⁰⁵ was characterised by a regime of co-ownership with an accord for common exploitation. In addition to a common aim, in broad terms, it also required contribution of capital or work and a possibility of profit for all members. It is important to observe that as a result of the development of Roman law, 'contract with a third party made by a *socius* in the course of common business affected only himself, he alone becoming liable to the third party and having the sole right against him'.⁴⁰⁶ This form of *societas* created obligations concerning the agreed contributions of any nature and was bound by *fides*, the bonding of civic community for the achievement of mutual benefits.⁴⁰⁷ As a form of partnership it could be dissolved *ex voluntate* and *ex actione*, by *capitis*

⁴⁰⁰ Schiavone 1987: 63–8 and most recently in 2005: 45–8, but for the first time in 1977: 137ff. Cf. Cic. *Top.* 6.29 on Quintus Mucius' abstraction of the definition of '*gentiles*'. See Chapter 1: 27.

⁴⁰¹ Arangio-Ruiz 1935. ⁴⁰² Gai. *Inst.* 3.154 (trans. by de Zulueta 1946).

⁴⁰³ Gai. *Inst.* 3.154a (trans. by de Zulueta 1946). On the meaning of *ercto non cito*, already obscure in the late Republic, see de Zulueta 1946–53: II 175. Cf. Ernout and Meillet 1959–60: *cieo* (119), *eriscio* (200); Walde 1965: *cieo* (213), (*h*)*erctum* (640). On the etymologies of the *jurisconsultes* see Biondi 1964.

⁴⁰⁴ Schiavone 1987: 65 ascribes to him the *distinctio generum*. *Contra* Talamanca 1981. See Watson 1965: 125–46. Cf. *Dig.* 29.2.78, 44.7.57, 50.16.25. On these texts see Arangio-Ruiz 1950: 3ff. and 21ff. and Bona 1973a: 15.

⁴⁰⁵ De Zulueta 1946–53: II 179.

⁴⁰⁶ De Zulueta 1946–53: II 179.

⁴⁰⁷ Kunkel 1949: 243.

deminutio, insolvency and death of a *socius*, who, even if replaced by an heir, would still require the creation of a new *societas*.

This form of partnership, based on a consensual contract, is contrasted with *societas* between *sui heredes* who had not divided the *hereditas*, as well as with its artificial imitation between ‘other persons, who desired to set up a partnership of the same kind . . . by means of a definite *legis actio* before the praetor’.⁴⁰⁸

This form of archaic *societas* was the *societas ercto non cito* or *consortium*, a partnership characterised by a continuum of joint heirs in a condition of undivided property, for which no formal act of contract was required, but was, in general, simply generated by express or tacit consent.⁴⁰⁹

As Gaius reports, ‘in this form of partnership whether between brothers succeeding as *sui heredes* or between other persons who contracted a partnership on the model of such brothers, there was this peculiarity, that even one of its members by manumitting a slave held in common made him free and acquired a freedman for all the members, and also that one member by mancipating a thing held in common made it the property of the person receiving in mancipation’.⁴¹⁰ In other words, an important characteristic of this form of partnership, which stood out in the eyes of a writer from the second century AD, was that each of the members owned and could legally dispose of the whole.

Although *consortium* came to be treated as a matter of agreement, and its artificial form was eventually replaced by the consensual *societas omnium bonorum*, conceptually these two legal institutions display two distinctive ways of conceiving associations of men with regards to the relation of individual interest and that of the whole. Whilst in the *societas omnium bonorum*, the interest of the partnership consists of the sum of individual interests, provided all worked to achieve the common agreed aim, in a *consortium* the individual interest coincided with the interest of the whole. As Gellius recalls when discussing Pythagorean training, amongst the disciples of Pythagoras individual property became common, and all of them came to form a *societas inseparabilis*, ‘an inseparable fellowship, like the old-time association which in Roman legal parlance was termed an “undivided inheritance” (*societas inseparabilis, tamquam illud fuit anticum consortium quod iure atque verbo Romano appellabatur ercto non cito*)’.⁴¹¹ This was therefore the form of partnership with which Quintus Mucius

⁴⁰⁸ Gai. *Inst.* 3.154b; de Zulueta 1946–53: II 174–5.

⁴⁰⁹ Arangio-Ruiz 1950 3ff. (= 1982); Bretone 1960; Guarino 1972: 13ff.; Tondo 1975 and 1994: 601–12; Kaser 1971: 100–1.

⁴¹⁰ Gai. *Inst.* 3.154b (trans. by de Zulueta 1946). ⁴¹¹ Gell. *NA* 1.9.12.

Scaevola was familiar: *societas ercto non cito*, characterised by undivided ownership, absolute coincidence of private and communal interests, and provided with a legal personality.⁴¹²

Often described as a Stoic, son of the consul of 133 BC, who had been close to both Tiberius Gracchus and Blossius, Quintus must have become familiar with Blossius, or Blossius' ideas, at his father's home.⁴¹³ Although this has led scholars to interpret his thinking as an expression of Tiberius' democratic ideas, he actually seems to share Cicero's viewpoint. Building on the Stoic tenet, as formulated by Antipater in the *de officiis*, that every man should consider the interests of the other as one's own, Quintus elaborated a notion of a *societas* not dissimilar from that held by Cicero in the *de republica*.

As Asmis has shown, in the *de re publica* Cicero's conception of a *res publica* as the property of a group of persons 'formed into a partnership by a common agreement on law and a sharing of benefits' is very much analogous to the idea of partnership.⁴¹⁴ Like a partnership, the commonwealth is a communal enterprise of the whole people, who must agree on the criteria to be applied to the distribution of contributions and rewards, which all members of the community must perceive as fair.

In the second century AD, Gaius had drawn up an explicit analogy between commonwealth and *societates*: they both possess common assets and both have a common agent who establishes what must be done in common.⁴¹⁵ Interestingly, both are based on consensus and governed by laws (in the case of a *societas*, *ius societatis*, the 'law of partnership', or, in its absence, in the case of partnerships which rely only on consent, by the *ius gentium*, the law of nations). Most of all, *societates* as well as commonwealths are created in such a way as to guarantee that partner members receive a share in profit which is proportionate to their contribution, and, although the criterion to calculate this proportion is not undisputed, it must be informed by a principle of fairness. It is likely that Quintus Mucius shared with Cicero, as well as the vast majority of ordinary late Republican Romans, an understanding of the commonwealth as a *societas*, which, whilst generally orientated towards the common good, nevertheless allowed for the pursuit of individual interest in a proportional redistribution of profits according to contribution

⁴¹² Berger 1953: 708 (s.v. *societas*) and 409 (s.v. *consortium*).

⁴¹³ On Quintus' description as a Stoic see Cic. *De or.* 1.230; Ath. 4.274c. On his relationship with Blossius Cic. *Amic.* 37. Hadot 1970: 174. See also Schiavone 1994: 163, n.114.

⁴¹⁴ Asmis 2004. ⁴¹⁵ Dig. 3.4.1.1.

However, as Quintus well knew, in the late Republic there was also a different notion of *societas*, that is the *societas ercto non cito*, artificially constructed on the basis of the *consortium*, and which presented a completely different kind of partnership. Characterised by the identity of individual interest with that of the community, with each member of the partnership owner of the whole, and implicitly informed by the notion of arithmetical equality, this form of *societas* would have created a significantly different conception of the commonwealth.

Although historically grounded in archaic Rome, at the very end of the Republic, this notion of a *res publica* analogous to the legal institution of the *consortium* sporadically re-emerged in the political language of the time from the shadow of the predominant conception of *societas*.⁴¹⁶ A relic of a different fashion of political reasoning, Livy revealingly adopts *consortium* to describe the sort of community that the plebeians wish to establish with the patricians: a partnership that, based on family ties and the possibility of attaining high office, is ‘open to them [the plebeians] to be associated with you [patricians] in taking their share of the government, and – which is the essence of equal liberty – to rule and obey in turn, in the annual succession of magistrates’.⁴¹⁷

These notions, taken together, have enough similarities and connections to justify the reference to them as constituting an intellectual tradition of *popularis* character.

Some features of the *consortium*, and its application to the context of *aequa libertas*, understood as the right to rule and being ruled in turn, also seem to have been incorporated within the distinctive traits of democracy reported by its supporters in Cicero’s *de re publica*. If, on the one hand, here democracy is considered the best form of constitution because the people are the masters of laws and offices, and the interests of the individual and of the community are one and the same, on the other, its critics regard it as the worst of all possible constitutional arrangements. In their opinion, not only is this the most unstable of the simple forms of government, as it is almost impossible for it not to be affected by *interiectis iniquitatibus aut cupiditatibus*,⁴¹⁸ but also is the most unjust, as, on the one hand, it does not uphold the *gradus dignitatis* and, on the other, like a monster, it oppresses its citizens, as everything belongs to it and nothing to the individual people. “When everything is said to be administered by the people, and to be in the people’s power (*per populum agi dicuntur et esse in populi potestate omnia*);

⁴¹⁶ For a late survival of the *consortium* see Plin. Younger *Ep.* 8.18.

⁴¹⁷ Livy 4.5.5. See also Livy 6.40.18 (cf. 40.8.12); Cic. *Off.* 3.26; Pomp. *Trog.* 38.152.13; Tac. *Ann.* 14.11.1.

⁴¹⁸ Cic. *Rep.* 1.42.

when the multitude inflicts punishment on whomsoever it will, when it seizes, plunders, retains, and wastes whatever it will, can you deny, Laelius, that we have a commonwealth then, when everything belongs to the people, and we have defined a commonwealth as ‘the property of a people (*populi esse rem volumus rem publicam*)?’ [Laelius:] “There is no government to which I should more quickly deny the title of the commonwealth than one in which everything is subject to the power of the multitude (*in multitudinis potestate*). The power of the mass, the *potestas multitudinis*, is tantamount to true tyranny . . . I cannot see how the name of commonwealth would be more applicable to the despotism of the multitude (*magis in multitudinis dominatu rei publicae nomen appareat*). For in the first place a people exists only when the individuals who form it are held together by a partnership in justice, according to your excellent definition, Scipio. But such a gathering, as you have mentioned, is just as surely a tyrant as if it were a single person, and an even more cruel tyrant, because there can be nothing more horrible than that monster which falsely assumes the name and appearance of a people (*sed est tam tyrannus iste conventus, quam si esset unus, hoc etiam taetrior, quia nihil ista, quae populi speciem et nomen imitatur, immanius belua est*).”⁴¹⁹

Cicero’s critique of democracy is amply in debt to Plato. The picture of the tyranny of the multitude, where the excesses of democracy are humorously described as causing the complete collapse of social distinctions and the transformation of liberty into *licentia*, is a translation (at times a free one) of Plato’s *Republic*.⁴²⁰ Although his criticism of ochlocracy (and its very close counterpart, democracy) certainly owes much to the Greek philosophical tradition, he re-elaborates the critique in Roman terms, providing Roman political discourse with its own conceptual categories to argue in support or against political measures. As we have discussed above, Cicero’s critical analysis of democracy not only exploits the definitional meaning of the Latin term *res publica* (for which no Greek equivalent is attested), but it also has affinities with the conceptual framework within which *consortium*, a typically Roman juridical institution, was conceived.

This is not to say that there was a reified philosophical system, which should be identified as a certain strand of Stoicism, or possible

⁴¹⁹ Cic. *Rep.* 3.45.

⁴²⁰ Cic. *Rep.* 1.66–8 and Pl. *Rep.* 8.562c–563e. See Poncelet 1947: 178–96, Gregory 1991 and Powell 1995. *Licentia* indicated what is beyond the limits of the acceptable. At times still used in its original meaning of ‘what is permitted’ (*Dig.* 3.5.37; Gai. *Inst.* 2.228), *licentia* was inevitably open to conflicting interpretations: see, for example, Clodius’ shrine to *Libertas* renamed by Cicero as a shrine to *Licentia* (Cic. *Sest.* 109; *Dom.* 108–11; *Leg.* 2.42; and Chapter 4: 212–14). On this issue see Brunt 1988: 320.

interpretation of it.⁴²¹ Bearing in mind how little has been preserved of any intellectual tradition that is ‘non-optimate’, these notions nevertheless present a coherent set of ideas that could be, and indeed were, read in the late Republic as part of the same intellectual tradition, which can be called ‘*popularis*’. In this intellectual tradition, the liberty of the commonwealth found its realisation only in a democracy. In this form of government, the only way in which liberty could be preserved was through collective self-determination that did not yield the citizens’ power of self-government.

⁴²¹ *Contra* Nicolet 1970a and Hadot 1970.

The political struggle in the first century BC

Recent scholarly studies have shifted the focus of their interest from the politics of the elite to the role of the people in the political process. Consequently, the issues on which the political battle was fought have come to the fore. New perspectives on Roman Republican politics have abandoned the emphasis laid on the structure of the elite and its internal political manoeuvrings as well as the accompanying debates over the nature of family alliances and political groupings.¹ The reduced role of *clientela*, the rehabilitation of the *plebs* and their function as political agents, and the eventual introduction of the notion of democracy into the reading of Roman politics have all diverted attention to the issues perceived by the actors themselves as central in Roman politics.² As Beard and Crawford state: ‘Roman accounts of politics systematically present political conflict as being about “real issues”, about access by the people to the rewards of conquest and the creating of the political means to achieve this end.’³

Studies that rightly assert the centrality of real issues within the Roman political framework have provided the best results when focusing on the socio-economic context in which these issues developed.⁴ However, when analysed within the context of the political strife of the first century BC, such issues have been seen as pure instruments either to maintain or to challenge the supremacy of the ruling elite, and, occasionally, as a response to a wider political programme.

¹ For the study of the elite the following works are still fundamental: Gelzer 1969 and Münzer 1999. See also Syme 1939, Bleicken 1972, Scullard 1973, Gruen 1974, Meier 1980 and Burckhardt 1988.

² For a reduced role of *clientela* see Brunt 1988: 382–442, Wallace-Hadrill 1989: 63–87, Pani 1997: 132–40 and Mouritsen 2001: 67–101. For the rehabilitation of the *plebs* see Kühnert 1991, Will 1991 and Prell 1997, and for its political role Vanderbroeck 1987, Jakobson 1992, 1995 and 1999, Purcell 1994 and Pina Polo 1996. For the emphasis on democracy in the analysis of the Roman political system see Millar 1984, 1986, 1989, 1995b, 1998 and 2002b. For the most recent review of scholarly interpretation on the nature of the Roman Republican system see Tatum 2009 and Hölkeskamp 2010 with further discussion in Crawford 2011 and Hölkeskamp 2011.

³ Beard and Crawford 1999: 68.

⁴ The finest example of this approach is still Brunt 1971b.

This scholarly approach has produced its best results in two distinct fields. On the one hand, through detailed analysis, often prosopographical in nature, of the specific context, these studies have reconstructed and brought to light otherwise unknown or obscure episodes of Roman political history. On the other hand, they have highlighted the existence of a largely coherent set of political actions, to be attributed either to the reformist behaviour of the *populares* or to the opposition of the *optimates* (often on a case-by-case basis) in their attempt to preserve their political control and hegemony.⁵

However, despite the repeated claims of the centrality of the political value of liberty to Roman political identity, none of these works has focused its attention on the ideological discourse of the political debate concerning these issues.⁶ As such, an essential facet of Roman politics has inevitably escaped scholarly attention. Not only did the *optimates* resist the *populares* (understood primarily as opposing value systems) on a case-by-case basis, but they also followed a basic pattern of opposition, based on certain specific issues to which they returned over and over again, regardless of their suitability in the current political climate.⁷ Whilst this has long been noted by previous scholarship, a crucial aspect of this particular mode of opposition has not been fully scrutinised: those politicians who appealed to the values of the 'optimat' tradition in order to maintain the socio-political *status quo* adopted a consistent pattern of political behaviour, namely the opposition to the granting of extraordinary powers and to land distribution, and the support to the '*senatus consultum ultimum*', because, they claimed, they were motivated by the principle of *libertas*.⁸

Regardless of the outcome of political battles on specific issues and the politicians' contextual reasons for adopting a certain course of action (which could range from political alliance to personal advantage, or even genuine idealistic commitment), this chapter aims to highlight these consistent lines of action of the *optimates*, and the recurrent profession of the political

⁵ Serrao 1970, Perelli 1982, Mackie 1992 and Pani 1997: 211. A full study of the means adopted by the *optimates* may be found in Burckhardt 1988. On the various techniques of the *popularis* politician and the issues he typically espoused have been collected and studied in detail: Meier 1965: esp. 599–612 and Martin 1965: 210ff. On *optimates* and *populares* see Introduction: 8.

⁶ The most notable exceptions to this trend are the excellent works by Morstein-Marx 2004 and Wiseman 2009.

⁷ Serrao 1970: 530 claims that from the time of the Gracchi onwards the *optimates* tried to neutralise every attack made against their supremacy by reacting on a constant basis to the policies elaborated by the *populares*.

⁸ Burckhardt 2000 recognises a certain degree of continuity in the policies of the *optimates*. The issue is presented *in nuce* but not analytically developed in Wirszubski 1950: 40–65.

principle of liberty, for the sake of which such actions were claimed to be pursued.

From the outset two important caveats ought to be borne in mind: first of all, the fluid nature of the Roman political system, with its articulations phrased in terms of *optimates* and *populares*, should not mislead us into interpreting this system as one of conflict between two homogeneous and defined structures vaguely resembling the modern political party system.⁹ As aforementioned, *optimates* and *populares* were labels which conveyed a complex web of references. Amongst other things, they referred to a largely coherent set of values, which could be embodied in specific policies. In turn, these policies, and the politicians who supported and advanced them (even only temporarily or for solely cynical reasons), could be described in the same terms.¹⁰

Secondly, we must remember the nature of the extant sources. Our understanding of the Roman political conflict of the late Republic is dependent on the caprice of tradition, as well as consciously adopted selective criteria which may not have preserved attestations of the use of certain political ideas in a given context.

The way in which the state of the extant sources inevitably conditions our analysis is well exemplified by the cases of Labienus' proposal regarding the elections of priests in 63 BC and by Scribonius' scheme for reordering the streets in 50 BC.¹¹ These two proposals could be included for their context and content in the pattern of opposition adopted by those aiming to preserve the *status quo* in the name of liberty. However, the scanty state of the available evidence makes it impossible to confirm that an appeal to political values, if one was ever made, was carried out in the name of *libertas*. Although both proposals, in fact, are distinguished by their highly *popularis* character and seem to have encountered a certain degree of opposition (successful in the case of Scribonius and unsuccessful in the case of Labienus), the dearth of evidence prevents the consideration of their ideological dimension in this political context. The bill proposed by Labienus, whose tribunate in 63 BC

⁹ See Introduction: 8.

¹⁰ Our sources refer to some policies as specifically *popularis*: for example Cic. *Cat.* 4.9 in connection with popular policy. Cf. Cic. *Att.* 1.20.3: *viam optimatem tenere*.

¹¹ Meier 1965: 609, n.24 lists the issue of abolition of debt (the so-called *tabulae novae*), of probable *popularis* character, for which, however, the paucity of sources does not allow a reconstruction of the political debates concerning its introduction and opposition. On the issue still of value see Frederiksen 1966. Given the state of the available evidence as well as their content concerning the freedmen's right to vote, a not dissimilar case is constituted by the so-called *leges de libertorum suffragiis* on which see Arena 2006.

was regarded as *popularis*,¹² restored to the people the right of electing public priests, originally assigned to them in 104 BC by the *lex Domitia*.¹³ The proposal seemed to reassign the popular assembly its central position in the Roman political system, and, allowing for an electoral system based on the vote of seventeen tribes chosen by lot, once again to affirm its sovereignty. This political feature, one might assume, could have been perceived as a means of furthering *libertas* or even, according to another intellectual tradition, as liberty itself.¹⁴ However, the opposition that this bill encountered, as attested in the sources, does not mention any political value in the name of which this proposal was fought. Thus, despite being coherently harmonious with their consistent practice of opposition, this measure cannot be included in the identification of the *optimates*' political pattern of opposition.

The *rogatio Scribonia viaria*, presented in 50 BC, aimed at reordering the streets by establishing a five-year commission with a wide range of powers and assigned the role of road commissioner to Scribonius himself. Caelius, thundering against it, accused Scribonius, depicted as *popularis*, of behaving irresponsibly: 'because he had not got his way about intercalation,' Caelius remarked 'he has gone over to the "democrats" and started talking in favour of Caesar (*levissime enim, quia de intercalando non obtinuerat, transfugit ad populum et pro Caesare loqui coepit*). He has brandished a road bill (not unlike Rullus' agrarian bill) and a food bill, which tells the *aediles* to distribute.'¹⁵ This proposal, clearly *popularis* in character, was opposed by Pompey's friends and, as Appian reports, eventually failed.¹⁶ The Rullan agrarian proposal of 63 BC, the implementation of which was also assigned to an *ad hoc* five-year commission empowered with special commands, encountered strong opposition. As Cicero claims, the establishment of this commission would have been detrimental to the value of Roman liberty.¹⁷ It follows that hypothetically, but not implausibly, the association of Scribonius' *rogatio* with Rullus' agrarian measure was also pursued in the name of liberty. Unfortunately, however, this is not enough to include the conflict over this proposal within the pattern of opposition

¹² Meier 1965: 603 n.7. On this proposal most recently North 2011.

¹³ Asc. 80C dates Domitius' tribunate to 104 BC, whilst Vell. Pat. 2.12.5 to 103 BC. Asconius' dating is generally accepted. See Broughton 1951–2: 1 562.

¹⁴ See Chapter 3: 80ff.

¹⁵ Caelius in Cic. *Fam.* 8.6.5 (trans. by Shackleton Bailey 2001). On Scribonius' move in Caesar's support and against Pompey and the optimate group see also the sources listed in Broughton 1952: II 249. Throughout the work I adopt Rotondi's names of Republican laws (1912) as a widely accepted scholarly convention (even when they are not so attested in the ancient sources or do not appear entirely accurate).

¹⁶ App. *B. Civ.* 2.27.

¹⁷ See below 232–8.

consistently followed by the *optimates* and constantly pursued for the sake of *libertas*.

In identifying such a pattern of opposition, it is important to remind ourselves of a well-known fact, that the *optimates* (supporters of the *status quo*) did not oppose any measure that was presented to them by those who challenged their supremacy.

Perhaps the most striking example of this is the legislation put forward by Clodius, the *popularis* politician *par excellence*, who chose to renounce his patrician status in order to become a tribune of the plebs.¹⁸ On the day he entered the tribunate, 10th December of 59 BC, Clodius promulgated four laws, described in our sources as *quattuor leges perniciosae*.¹⁹ Amongst these measures, perceived by his contemporaries as *popularis*, there was the so-called *lex Clodia frumentaria*, which provided Roman citizens with a free monthly ration of five *modii* of grain.²⁰ This bill, labelled as '*summe popularis*' by Asconius, is reported to have won Clodius 'the people's lasting devotion'.²¹ Although it imposed such a heavy weight on the *aerarium* that the senate had to instruct the curule aediles to mint a special issue of coins to cover the additional expenses, our sources do not register any opposition either in the senate or through the imposition of a tribunician veto.²² The usual outcry against the savage exploitation of the public *aerarium* this time was not uttered.²³

Even one of their own representatives, the staunchest optimate of all, Cato the Younger, had successfully promulgated a very similar measure just four years earlier. During his tribunate in 62 BC, M. Cato had passed a law that extended the benefits of the *lex Terentia et Cassia* with the declared intention of alleviating the living conditions of 'the poor and the landless plebs'.²⁴ Whatever the immediate reasons for his actions (perhaps, as often suggested, the desire to reconcile the plebs with the senate in order to deprive Pompey of the pretext for military intervention), it remains a fact that none of the *optimates* put up any resistance to this measure. This lack of political opposition is even more striking, given that Cato's measure had

¹⁸ For a nuanced picture of Clodius, see the excellent and comprehensive treatment by Tatum 1999.

¹⁹ Cic. *Pls.* 9; Asc. 8C.

²⁰ Cic. *Dom.* 25, *Sest* 55; Asc. 8C; Plut. *Cic.* 30.1; Dio Cass. 38.13.1; Schol. Bob. 132 St.

²¹ Tatum 1999: 121.

²² Crawford 1974: 707 and RRC 422. See Suet. *Jul.* 41.3: the strain put on the *aerarium* by this measure was so demanding that Caesar, once dictator, had to reduce the number of those entitled to receive public grain.

²³ For the arguments usually put forward against the *leges frumentariae* see as emblematic those against the *lex Sempronia* in 123 BC. Cic. *Sest.* 103, *Font.* 39, *Off.* 2.72, *Tusc.* 3.48, *Brut.* 222; Flor. 2.1; App. *B.Civ.* 1.21; Plut. *C. Gracch.* 5.1; Vell. Pat. 2.6.3; Diod. Sic. 34–5.25.1.

²⁴ Plut. *Cat. Min.* 26.1.

raised the cost of the *frumentationes* by at least thirty million sesterces.²⁵ This considerable increase could now be sustained by the *aerarium* thanks to the rise in income brought by Pompey's conquests. It was this felicitous financial circumstance that allowed the old Gracchan idea concerning the sharing of imperial benefits to prevail.²⁶ According to the system that this legislation put in place, the onerous responsibility of feeding the plebs of Rome fell upon the provinces. This scheme preserved the Roman aristocracy from any direct interference with its immediate economic interests, and could, therefore, be accepted.²⁷

Two other laws promulgated by Clodius during his tribunate shared the fortune of the *lex Clodia de frumentatione*: the *lex Clodia de agendo cum populo* (otherwise known as *lex Clodia de obnuntiatione*) and the *lex Clodia de censoria notione*. The first law, which in modern scholarship is usually regarded as *popularis* in character, is rather obscure in its exact content.²⁸ All that can be asserted with certainty is that it altered the provisions of the so-called *leges Aelia et Fufia*, a set of regulations that limited or prohibited the gathering of public assemblies.²⁹ The procedure of *obnuntiatio* (the right possessed by magistrates and augurs to obstruct proceedings of the popular assemblies through announcement of unfavourable omens), which Clodius modified in his law, had always been regarded by the Romans as a stronghold of the *optimates'* supremacy. It was perceived as a means adopted by the ruling elite to manipulate the working of the assemblies, and thereby to preserve its own power. However, it is important to note that despite this widespread perception Clodius' law did not encounter any opposition and, perhaps as a result of its genuine reformist intent, was never abrogated or modified.³⁰

The second law mentioned above, the *lex Clodia de censoria notione*, forbade the censors from excluding any senator from the *album senatorum* or from punishing anyone with their *nota* unless the procedure was carried

²⁵ Rickman 1980: 169ff.; Fehrle 1983: 98ff. For the surveys of Republican legislation concerning grain distributions see Schneider 1974: 361ff., Nicolet 1980: 186ff., Rickman 1980: 161ff. and Nippel 1988a: 110–11.

²⁶ Plut. *Ti. Gracch.* 9. ²⁷ Ferrary 1982: 754.

²⁸ On its *popularis* character see Meier 1965: 603 n.10 and 607. *Contra* Drumann and Groebe 1902: II 203 and Tatum 1999: 125–33. Brunt 1988: 339 connects very loosely this measure with the meaning of *libertas*.

²⁹ Cic. *Red. sen.* 11, *Sest.* 33, 56, *Har. resp.* 58, *Vat.* 18ff., *Prov. cons.* 45f., *Pis.* 9f.; Asc. 8C; Dio Cass. 38.13.6. According to Weinstock 1937 Clodius abolished *obnuntiatio tout court*, according to Balsdon 1957 *obnuntiatio* was suspended whenever deemed necessary and according to Greenidge 1893 it was maintained only in electoral assemblies. On this law currently the best treatment is Tatum 1999: 125–33 with an ample discussion of previous scholarship.

³⁰ Asc. 8C; Cic. *Vat.* 18. Tatum 1999: 128 interprets this measure's intent as that of codifying in 'public law what was in fact sound augural law'.

out in the presence of both magistrates.³¹ This measure is often considered *popularis* in nature, since it aimed at curbing the excessive powers of those Roman magistrates who were otherwise in a position to interfere with the citizens' lives at will, or at least felt to be so.³² Although there is no doubt that members of the nobility must have looked very favourably on this law, since it inevitably put a check on the extensive powers of their colleagues, it appears that no opposition was raised against this measure, considered in modern scholarship part of a traditional '*popularis* programme'.³³

The fourth of these *leges perniciosae* promulgated by Clodius during his tribunate was the *lex Clodia de collegiis*, which allowed for the legal establishment of new *collegia*, despite the fact that in 64 BC the senate had decreed the dismantling of those whose constitution might have threatened the *res publica* and had forbidden the celebration of their *ludi*.³⁴ The *collegia* were associations of citizens gathered together for religious, professional and social reasons, which also usually welcomed slaves and freedmen amongst their participants. The members of the establishment, active in defending the *status quo*, looked at them with a considerable degree of suspicion, in the light of their proven potential as a political force to create consensus, exert pressure and ultimately employ violence. None of their activities could be tolerated: when in 61 BC an unknown tribune attempted to lend his *auxilium* to the *collegia*, which wished to celebrate the *Ludi Compitalicii*, the consul-designate Metellus Celer used his *auctoritas* to intimidate the tribune and scare the celebrants.³⁵ Thus, Clodius' measure in 58 BC, which reasserted the people's right to association perhaps in the name of the *mos maiorum* and, in Brunt's opinion, liberty, came inevitably to be perceived as *popularis* in character.³⁶ While the other laws promulgated during Clodius' tribunate did not incur any controversy or outright opposition, this measure met resistance from Cicero and from his loyal ally, the tribune of the plebs L. Ninnius Quadratus. The latter, although he had

³¹ Asc. 8C; Dio Cass. 38.13, 40.57; Schol. Bob. 132 St; Cic. *Sest.* 55, *Pis.* 9ff. On this law see Tatum 1990a and 1999: 133–5. This law has also been interpreted as establishing a system of appeal against censorial decisions: see Lintott 1999: 117–20. See Chapter 2: 61–2.

³² Meier 1965: 606 n.17.

³³ See, for example, Perelli 1982. Cf. Dio Cass. 38.12.4 according to whom the legislative programme implemented by Clodius in 59/8 BC was aimed at gaining the favour not only of the plebs but also of the *equites* and senators.

³⁴ Cic. *Sest.* 34, 55, *Pis.* 9, *Dom.* 129, *Red. sen.* 33, *Red. pop.* 13, *Att.* 3.15.4; Asc. 7C; Dio Cass. 38.13.2. On the dismantling of the *collegia* see Flambar 1981 and Fraschetti 1990: 203–11. See Tatum 1999: 117, n.14.

³⁵ Cic. *Pis.* 8; Asc. 7C

³⁶ Brunt 1988: 306. On Numa and the foundation of the *collegia* see Gabba 1984. For its *popularis* character, see, for example, Meier 1965: 602 n.6.

been unable to hinder the celebration of the *Ludi Compitalicii*, could now exercise his veto on Clodius' proposal. In doing so, he could have invoked the senate's decree of 64 BC, as well as his past record as opponent of the *collegia*, in order to justify his actions in terms of consistency and *dignitas*. However, he did not interpose his veto. He was actually restrained from doing so by Cicero who, as Tatum has clearly shown, had been persuaded by the very princes of the senate, but interestingly not by the dynasts, to let the measure go ahead.³⁷ Thus, once again, a measure which might have been perceived by the contemporaries as *popularis* did not encounter the fierce opposition of the very core of the *optimates*, but was rather resisted by a minority group, whose opposition did not have recourse to the idea of liberty as alleged motive to object to it.

Similarly, during Caesar's consulship in 59 BC, a set of judiciary laws potentially perceived as *popularis*, the *lex Iulia*, the *lex Fufia* and the *lex Vatinia*, was promulgated without meeting any opposition.³⁸ The *lex Iulia de repetundis* established a complex series of regulations regarding the behaviour of provincial governors in relation to the *crimen repetundarum*.³⁹ According to Dio, Caesar did not encounter any resistance in ratifying not only Pompey's acts, but also many of his measures. Even Cato did not object to their promulgation. However, during his praetorship, he very unwillingly followed Caesar's provisions in allotting the courts and confined his intrinsic irritation at the laws to the rather feeble expedient of suppressing their name, so to avoid calling them the laws of Julius.⁴⁰ Cicero, on his part, praised the *lex Iulia de repetundis* as an excellent law and scrupulously complied with its strictures in Cilicia. Thus, once again, a law that was perceived as anti-senatorial did not encounter any opposition and indeed endured for many centuries.

At around the same time, Q. Fufius Calenus, praetor in 59 BC and usually regarded as Caesar's satellite, passed a judiciary law. It required that each of the three *ordines* comprising the jury at *iudicia publica* gave separately statements of their votes.⁴¹ Dio, whose narrative of the events

³⁷ Cic. *Att.* 3.15.4; Dio Cass. 38.14.1. On this law see Tatum 1990b and 1999: 136–8.

³⁸ Meier 1965: 608. On the *lex Fufia* and the *lex Vatinia* as *popularis* measures see Meier 1965: 608, n.20, 21. The perception of the *lex Vatinia* as *popularis* may be reinforced by Cicero's strategy to attribute the inception of this proposal to Gabinius in order to detach his client Cornelius from its introduction.

³⁹ Cic. *Sest.* 135, *Vat.* 29, *Rab. Post.* 8, 12, *Pis.* 37, 50, *Dom.* 23, *Prov. cons.* 7, *Att.* 5.10, 5.16, 5.21, *Fam.* 2.17, 5.20, 8.8; Suet. *Caes.* 42–3; Tac. *Ann.* 14.28, *Hist.* 1.77; Val. Max. 8.1.10; Plin. *Ep.* 2.11.3, 2.19.8, 4.9.9, 6.29.9; Dig. 48.11. On this law see Gruen 1974: 240–3.

⁴⁰ Dio Cass. 38.7.5–6.

⁴¹ Dio Cass. 38.8.1; cf. Cic. *Fam.* 8.2.1, *Q. fr.* 2.16.3; Asc. 8C. MacDonald 1957: 198; prior to that only totals of votes cast for acquittal and for condemnation were available. On the correct date see Oost 1956 and Broughton 1951–2: II 188–9. Cf. Taylor 1951. *Contra* Rotondi 1912: 399.

of Caesar's consulship is organised topically rather than chronologically,⁴² connects this law with those Julian laws that did not encounter any resistance and thus does not feel obliged to dwell on them for too long since, as he says, they do not add much to the consulship's history. It, therefore, seems logical to infer that the *lex Fufia*, associated with the *lex Iulia de repentundis* for its perceived *popularis* character, also did not meet any opposition.

The third judiciary law passed in 59 BC was the so-called *lex Vatinia de reiectione iudicum*, which seems to have authorised accuser and defendant to reject whole panels of jurors.⁴³ Although the precise scope of this law can only be conjectured, it has been suggested that it allowed parties to extend the individual jurors to the *decuriae* assigned by the praetor and from which the jurors were selected.⁴⁴ None of the available evidence reports the political climate in which the law was promulgated. However, Cicero, in his fierce attack against Vatinius a few years later, describes this law as just before the public gathered to attend the trial.⁴⁵ This could indicate that the law, usually characterised as *popularis*, was also generally well regarded by Vatinius' opponents.

An equally important fact to underline is that not only did the *optimates* not resist all measures that the *populares* put forward, but also that even when they did oppose certain measures, they did not invariably claim to be acting in the name of liberty. From extant evidence, it appears that the tribune L. Ninnius Quadratus' initial opposition to Clodius' proposal on the *collegia* as mentioned above did not refer to the idea of liberty, and might have drawn some of its force from the senate's decree of 64 BC and Ninnius' own political stance.

A better documented case is the opposition to the so-called *lex Gabinia de versura Romae provincialibus non facienda*.⁴⁶ In 67 BC, during his tribunate (perceived by his contemporaries as *popularis* in nature), Aulus Gabinus promulgated this law, which forbade loans to provincials in Rome and did not allow for their full recovery.⁴⁷ Despite being in accordance with Gabinus' wider concern with the practice of provincial administration, Asconius attributed the formulation of this law proposal to the tribune C. Cornelius, Gabinus' colleague, and assigned its implementation to

⁴² Oost 1956: 20.

⁴³ Cic. *Vat.* 27, *Planc.* 36; Schol. Bob. 97, 149–150 St. (which confuses the *lex Vatinia* with the *lex Fufia*); cf. Cic. *II Verr.* 2.77. See Gruen 1974: 243.

⁴⁴ Greenidge 1926: 451–2 and Pocock 1926: III. ⁴⁵ Cic. *Vat.* 27.

⁴⁶ On these laws see Cic. *Att.* 5.21.12; 6.1.5, 6.2.7. See Sanford 1939: esp. 68–9. Badian 1959 and 1971: 73 and 84–8. Griffin 1973 and Gruen 1974: 251–2.

⁴⁷ On the *popularis* nature of the measure see Meier 1965: 607 n.18.

Gabinus, who secured its passage.⁴⁸ According to Asconius, 'his [Cornelius'] behaviour in this office [the tribunate] was seen as unreasonably tenacious, and he lost the support of the senate as a result. He had proposed to the senate that since money was being loaned to foreign delegations at interest, and notorious and disreputable profits were being made, the granting of funds to such delegations should be stopped. The senate rejected this proposal, and held that adequate steps had been taken in the decree passed some years before, in the consulship of L. (?) Domitius and C. Coelius [94 BC], since the senate, in accordance with that same decree, had very recently forbidden the lending of money to the Cretans.' Thus, a proposal that was clearly *popularis* in tone encountered opposition from the ruling elite for pragmatic reasons: the existence of a similar decree already in place since 94 BC and applied to the case of the Cretans only two years earlier.⁴⁹

Thus, as previous scholars have observed, it is not quite accurate to say that the *optimates*, understood as the supporters of the *status quo*, indiscriminately opposed whatever measure of *popularis* nature their opponents put forward in a desperate attempt to maintain their own supremacy. A very brief survey shows that on a case-by-case basis they sometimes accepted and even supported their adversaries' proposals. Another important aspect of their political conduct is that when they resisted their opponents' measures, they did so by invoking a variety of arguments and values.

However, underlying their opposition to the flurry of attacks of the *populares*, there were some perennial issues that the *optimates* constantly resisted. These issues that consistently recurred in their pattern of opposition lie at the heart of any analysis of Roman politics in the late Republic and concern the recourse to the so-called '*senatus consultum ultimum*', the granting of extraordinary powers to individuals (the so-called *potestates extraordinariae*), and the agrarian distributions. The important fact to underline is that by consistently following this basic pattern of opposition the *optimates* constantly professed to be acting in the name of liberty which, in their opinion, was under threat.

In what follows I will discuss these issues, highlighting their ideological dimension and the role played by the political idea of *libertas* in the arguments. These are very well-known episodes, of which the relevant facts can

⁴⁸ Asc. 57C. On this law see Cic. *Qfr.* 2.11.2–3; cf. *Att.* 1.14.5, *Fam.* 1.4.2. Most likely in the same year Gabinus also proposed a measure that confirmed a previously recognised arrangement (Cic. 11 *Verr.* 1.90), whereby during the month of February the senate was compelled to receive embassies as the first call on its time. Once again, no opposition is registered to this measure.

⁴⁹ The most probable date for the Cretan embassy appears to be February 69 BC (rather than 70); see Cic. 11 *Verr.* 2.76. On the embassy see also Diod. 40.1.1–3; Dio Cass. 30.5.111; App. *Sic.* 6.

be found in any study of Roman political history and will be discussed as briefly as possible, allowing more space for the presentation of the political ideas employed in the ensuing debate.

THE IMPERIA EXTRAORDINARIA

During the period under consideration here, the approximately twenty years between 70 and 52 BC, each time that contemporary political circumstances led to a call for the conferral of an *imperium extraordinarium* on an individual or a group, the proposal consistently and invariably met with strong opposition. Although this is a well-known feature of late Republican politics, it is important to underline a fact not always sufficiently emphasised by modern commentators: each time this situation occurred, those who exercised their resistance to the implementation of this measure claimed to be acting in the name of *libertas*. In what follows I will reconstruct the arguments put invariably forward by the opposition either before the senate or before the people.⁵⁰

The *imperia extra ordinem* were prerogatives that, approved by the senate and/or the popular assembly, conferred additional powers on an irregular magistrate to resolve an imminent crisis.

The term recurs in late Republican sources several times. Cicero adopts the adjective in his letters to refer to his governorship in Cilicia and to Octavian's position in 43 BC,⁵¹ whilst Brutus presents it, alongside *regnum*, *dominatio* and *potentia supra leges*, as one of the perennial targets of his opposition.⁵² Although the term features prominently in Cicero's *de domo* and *Philippics* II, it is absent from the *pro lege Manilia*, the very speech that Cicero delivered in support of the extraordinary power proposed for Pompey to fight Mithridates.⁵³ However, Cicero adopts it when referring to the powers proposed for the decemvirs in charge of land distribution in Rullus' scheme and to Cato's powers in Cyprus, and when talking about a rather vague *honus extraordinarius* to which Antonius is portrayed as aspiring.⁵⁴ While Sallust never deploys it, Caesar uses it only once,

⁵⁰ On the use of the sources to reconstruct these debates see Introduction: 2–5. Steel 2001: 113–6 and Morstein-Marx 2004: 179–86 both offer a thorough analysis of the sources and the arguments deployed in the debates regarding the *lex Gabinia* and the *lex Manilia*. Very interesting insights also in Yakobson 2009 and, most recently, a good survey in Hurlet 2010.

⁵¹ Cic. *Att.* 5.9.1 *munus extraordinarium*, *ad Brut.* 1.4a.3 (*honores extraordinarii*).

⁵² Cic. *ad Brut.* 1.17.6. See also Cic. *ad Brut.* 1.10.3 and *Fam.* 15.9.2. See also Vell. *Pat.* 2.30.3 and Asc. 65C on Pompey's powers in 66 BC labelled as *extra ordinem*.

⁵³ Cic. *Dom.* 18ff., *Phil.* 11.17ff.

⁵⁴ Cic. *Leg. agr.* 2.8, *Sest.* 60, *Phil.* 3.23. Cf. also Cic. *Prov. cons.* 19 for a description of Marius' powers in Gaul as *imperia extraordinaria*.

when, in the *Bellum Civile*, he claims that he has never aspired to any *extraordinarius honos*.⁵⁵

Unsurprisingly not included in the standard *cursus honorum*, from the third century BC the conferral of *imperium extraordinarium* was one of the responses adopted by the Romans to specific emergencies. Since, by virtue of its flexible nature, the Roman institutional system continually countered new challenges by adjusting its existing institutions to meet changing needs and new circumstances, its adaptability hinders the formulation of a strictly legalistic definition of the *imperia extraordinaria*.⁵⁶

Although none of these sources provides a neat juridical definition of these powers, it is possible to identify four characteristic traits which distinguished the powers *extra ordinem*. First, the status of the appointee, usually a *privatus*, who may or may not have previously held *imperium* (Pompey being an extreme case, since he had not even begun the *cursus honorum* when invested with these powers).⁵⁷ Second, the temporal limit of the powers. No longer constrained by the limitation to one year, the *imperia extraordinaria* not only could be renewed yearly, but were often assigned for three or five years, or even until the accomplishment of the assigned task. Third, the limits of the *provincia*, which, understood as the magistrate's field of action, were not invariably constricted by the boundaries of previous *provinciae*. Finally, the actual exercise of the magistrate's powers stretched beyond its traditional remit to include the appointment of one's own legates, the availability of access to separate finances and the possibility of reliance on wider military resources.⁵⁸

After the full restoration of the tribunes' powers, the proposal to bestow extraordinary commands upon an irregular magistrate recurred almost every year between 70 and 52 BC: the *lex Gabinia* in 67 BC; the *lex Manilia* in 66 BC; the *rogatio* of 65 BC in support of extraordinary powers for Caesar in Egypt; the *lex Vatinia* of 59 BC (connected with the *lex Pompeia Licinia de provincia C. Iulii Caesaris* of 55 BC); the *lex Clodia de provinciis consularibus* of 58 BC; the *lex Clodia de rege Ptolomeo et de insula Cypro publicanda* of 58 BC; the *lex Cornelia Caecilia de cura annonae Cn. Pompeio mandanda* of 57 BC; the *lex Trebonia de provinciis consularibus* of 55 BC; and eventually the

⁵⁵ App. *B. Civ.* 1.32.2. Cf. Ridley 1981: 292. ⁵⁶ Girardet 2007: 8.

⁵⁷ The *lex Pompeia de provinciis* of 52 BC established a gap of five years between tenure of office in Rome as praetor or consul and the tenure of command outside Rome: Dio 40.46.2; see Giovannini 1983: 114–19; Ferrary 2001; Hurler 2006. On the exceptionality of Pompey's career see Seager 1979.

⁵⁸ For the qualification of this *imperium* as *infinium* see Cic. 11 *Verr.* 3.213. For a discussion on Pompey's powers in these terms see Loader 1940: 134–6; for a complete review of those instances Hidalgo de la Vega 1986–7 and, most recently, the discussion in Vervaeke 2009. For the qualification of this *imperium* as *maius* in relation to Pompey's powers against Mithridates, see the insertion of the *provincia* of Asia in Pompey's triumph (Degraffi 1947: 13.1.85), even while governors had been regularly appointed to the province, and Cic. *Att.* 4.1.7 with regards to Pompey's *cura annonae*.

extraordinary confluence of powers in the hands of Pompey, sole consul in 52 BC.⁵⁹

The spectre of assigning special powers to an individual or a group consistently polarised the political struggle of the time, even if only temporarily. Proposing this measure was plausibly described and widely perceived by contemporaries as a *popularis* affair: 'an extraordinary command smacks of "popular" politics and inconsistency; it suits least of all our gravity, least of all this body (*populare atque ventosum est, minime nostrae gravitatis, minime huius ordinis*)', Cicero claims in 43 BC.⁶⁰ And so the support for the conferral of these powers was perceived as a public statement of a *popularis* stance. According to Dio, when in 66 BC Caesar and Cicero favoured the *lex Manilia*, conferring extraordinary powers upon Pompey against Mithridates, they did so neither out of concern for the commonwealth nor desire to please Pompey, but rather out of a wish to incur the goodwill of the multitude, which, as Caesar observed, was much stronger than the senate.⁶¹ 'Cicero, for his part, was aspiring to the leadership in the state, and was endeavouring to make it clear to both the plebs and the *optimates* that he was sure to make whichever side he should join preponderate. He was accustomed,' Dio comments, 'to play a double role and would espouse now the cause of one party and again that of the other, to the end that he might be courted by both. For example, a little while before he had said that he chose the side of the *optimates* (βελτίοι) and for that reason wished to be aedile rather than tribune; but now [offering his support to the conferral of extraordinary powers to Pompey] he went over to the side of the rabble (συρφετώδες).'⁶² Pompey, on his part, did not wish those in power to act too manifestly on his behalf, as he wished to be perceived as 'truly democratic (δημοτικόν) both in name and in fact, not merely by way of display, but in very truth'.⁶³

The *popularis* character of the *imperia extraordinaria* was, to a certain extent, intrinsically intertwined with the history of these special

⁵⁹ On the sources on the *lex Gabinia* see Cic. *Leg. Man.* 52, 54, 56 and *passim*, *Red. sen.* 11, *Corn.* 1.30 Cr.; Asc. 71Cff.; Livy *Per.* 99; Vell. *Pat.* 2.31; Dio Cass. 36.23, 30, 37; Plut. *Pomp.* 25.2; App. *Mith.* 94. On the *lex Manilia* see Cic. *Leg. Man.*, *Mur.* 34, *Orat.* 102; Livy *Per.* 100; Gell. *NA* 2.33; Vell. *Pat.* 2.33.1; Dio Cass. 36.43; Plut. *Pomp.* 30.1–4, *Luc.* 35.4; App. *Mith.* 97. On the *rogatio* of 65 BC in favour of Caesar see Suet. *Jul.* 11; Cic. *Leg. agr.* 2.44. On the *lex Vatinia* see Cic. *Sest.* 135, *Vat.* 35–6, *Prov. cons.* 41; Suet. *Caes.* 22; Vell. *Pat.* 2.44.5; App. *B. Civ.* 2.13; Plut. *Caes.* 14.5, *Pomp.* 48.6, *Cato min.* 33.3; Dio Cass. 38.8.5. On the *lex Clodia de provinciis consularibus* see Cic. *Sest.* 24, 44, 53, 55, *Pis.* 37, 57, *Dom.* 24, 55, 60, 70, 124, *Red. sen.* 18, *Har. resp.* 58, *Prov. cons.* 3, 7, *Att.* 3.1. On the *lex Clodia de rege Ptolomeo et de insula Cypro publicanda* see Cic. *Sest.* 56–7, 62, *Dom.* 20, 52–3, 65, *Har. resp.* 58; Vell. *Pat.* 2.45.4; Livy *Per.* 104; Plut. *Cato min.* 34.3; Dio Cass. 38.30.5. On the *lex Cornelia Caecilia* see Cic. *Dom.* 8, *Att.* 4.1.7, *Fam.* 1.1.3, 9.14, *Q. fr.* 2.5; Livy *Per.* 104; Plut. *Pomp.* 49.4, 50.1; Dio Cass. 39.9.3, 39.24.1. On the *lex Trebonia* see App. *B. Civ.* 2.18; Dio Cass. 39.33.2; Plut. *Pomp.* 52, *Caes.* 28.5, *Cato min.* 43, *Crass.* 15.5; Vell. *Pat.* 2.46.

⁶⁰ Cic. *Phil.* 11.17.

⁶¹ *Ibid.*

⁶² Dio Cass. 36.43.

⁶³ Dio Cass. 37.23.

commands. In origin, the conferral of extraordinary commands was initially discussed in the senate and then bestowed by the *comitia tributa*, which not only elected the person designated to carry out the special command, but often also passed a law outlining the nature of the new command and its function.⁶⁴ However, when the senate extended its power over the allotment of the provinces, it took control over the appointment of the magistrates assigned to govern the areas without referring it to the *comitia*, whose vote, consequently, fell progressively into disuse.

When the *comitia* returned to play a central role in conferring special commands, the governing senatorial elite inevitably saw in this move a claiming back of an old right, an action which they perceived as antagonistic to their power.⁶⁵ No longer the lieutenants of the senate from which they had formerly derived their powers, the holders of these special commands now came into being, so to speak, through the *comitia*, eschewing the senate's direct control. If, from a pragmatic point of view, the governing elite could not afford to lose its direct control over individual magistrates operating in remote provinces, from an ideological perspective the senate could perceive this fashion of implementing measures as the affirmation of the principle of comitial primacy, which encroached on an area that it had wished to see as its own exclusive remit.⁶⁶

As Yakobson puts it, 'the traditional opposition to extraordinary commands was inevitably "biased" against interventions by the assembly, even if this was not necessarily because foreign policy was the exclusive remit of the senate. If there was a general rule that contemplated foreign policy as the exclusive field of senatorial competence,' his argument continues, 'it was never respected in practice, if there had been a doctrine, it is very doubtful it could have found general acceptance.'⁶⁷ Although it was more a matter of perception than political reality, as the assemblies had exercised jurisdiction in provincial affairs when they saw fit, in the late Republic the senatorial elite perceived the granting of extraordinary powers as an affirmation of the people's power.⁶⁸

Even if the senate was still usually in charge of appointing formally the holder of these powers, the *comitia* arrogated to themselves the ability to

⁶⁴ Mommsen 1887: II 645 ff. See Cic. *Leg. Man.* 52 and Dio Cass. 36.42f. for the double *lex* that was needed in the case of Pompey.

⁶⁵ Cobban 1935: 86–7, Jashemski 1950: 19–34 and Ridley 1981: 289–91. See Millar 1998: 79–93 with a particular stress on the role of tribunician law.

⁶⁶ Cf. Cic. *Vat.* 36. See Yakobson 2009: 54: 'A measure bestowing imperium on an individual by the vote of the assembly, while it was open to criticism as "extraordinary" by its opponents, was apt to be regarded by its supporters as an exercise of the people's fundamental right, in Polybius' words, to "bestow office on the deserving" (14.9).'

⁶⁷ Yakobson 2009: 52–3. ⁶⁸ Gruen 1995: 539–40 and Yakobson 2009.

expand the spheres of existing *imperia*, to extend the temporal limits of their tenure, as well as to depose a senatorial commander in order to transfer his power to another official. In the late Republic, this tension between the prerogative of the senate and that of the popular assembly to confer extraordinary powers to a commander was at the root of the perception of this measure as *popularis* on the part of those who opposed it. Each time the issue concerning the possibility of granting extraordinary powers to an individual or a group of people was raised, the political debate was fiercely polarised. The participants in this debate could be described as *optimates* and *populares* according to the contingent stance they took and the related conception of politics they adopted to conceive and argue their case.

The fact that politicians could contingently appeal to a conception of politics to serve their aims explains how it was possible for Cicero, an *optimas* at heart, to speak publicly in support of conferring special powers to Pompey at least twice in the course of his political career (in 66 and in 57 BC),⁶⁹ and for Clodius, the *popularis* par excellence, to object violently to the conferral of extraordinary commands upon Pompey for the *cura annonae*. Equally, Catulus, bastion of the *optimates*, who eloquently opposed both the *lex Gabinia* and the *lex Manilia* concerning the conferral of extraordinary powers on Pompey, had previously approved the bestowal of these special powers on the same general in the fight against Lepidus,⁷⁰ whilst Cato, who kept the torch of the *optimates* burning after the death of Catulus, despite some initial hesitations, did not withhold from accepting a special command in Cyprus.⁷¹ It was not the case that, once a politician adopted a certain position regarding special powers, he was expected to maintain that stance all the way through his career. Rather, politicians shifted their support in favour of and against the conferral of extraordinary powers with considerable ease. Thus M. Porcius Cato and M. Junius Brutus, who were both said to have made almost a habit of protesting against the granting of *imperia extraordinaria*, ended up beneficiaries of these very powers.⁷² On the other hand, Clodius, who was congratulated by Caesar for providing Cato with a special command in Cyprus, accused Cicero of supporting on more than one occasion a highly deplorable measure concerning the concentration of special powers in the hands of a single man.⁷³

It follows that those who proposed the implementation of this measure, as well as those who opposed it, should not be conceived as members of

⁶⁹ Most recently on Cicero's thought as elaborated in his speeches see the excellent treatment by Gildenhard 2011.

⁷⁰ Cic. *Leg. Man.* 61. ⁷¹ Arena 2011b on Catulus and Lepidus.

⁷² On Cato see Cic. *Sest.* 60–3. On Brutus see Cic. *ad Brut.* 1.17.6; Brutus fr. 16 (Malcovati 1955: 463 = Quint. *Inst.* 9.3.95).

⁷³ Cic. *Dom.* 20–2.

political ‘parties’ or specific pre-structured factions of any nature, who, for more or less self-interested reasons, took a consistent stance on the issue.⁷⁴ However, this peculiarity of Roman political culture should not obscure two important facts: first, each time this proposal was advanced, by whoever found it convenient to do so, fierce opposition was consistently raised; second, such opposition was constantly carried out in the name of liberty.

If the resistance against the *lex Gabinia*, the *lex Manilia* or the *lex Trebonia*, to mention just a few, is a well-known fact, a close reading of the sources shows that even those laws for which a more or less unanimous support (or a minimal opposition) is usually assumed were actually met with a considerable degree of hostility from the time of their inception.⁷⁵ Thus, for example, the *lex Vatinia*, which granted Caesar Gallia Cisalpina for five years and Illyricum for three years (as well as the control of a fixed sum from the treasury and the right to elect his own legates), saw the senate itself adding to these powers an additional legion and the province of Gallia Narbonensis. As the sources report, the law had been vehemently opposed by Cato, and the senate’s later addition to Caesar’s already conspicuous powers did not denote a change of attitude towards these extraordinary powers, but rather a widespread fear amongst senators whose initial active resistance had been brought to a halt. In fact, Caesar could boast of having had all his wishes come true ‘against the grief and the lamentations of his opponents’.⁷⁶

Nor should the conferral of extraordinary powers on Cato be taken as an eventually unanimous and benevolent conversion towards these powers.⁷⁷ When Clodius invested M. Porcius Cato, at the time a *privatus*, with the capacity of quaestor with the authority of a praetor (*imperium quaestorium pro praetore*) and the task of supervising the annexation of Cyprus and the restoration of certain exiles to Byzantium, Cato initially refused it.⁷⁸ He replied that the conferral of extraordinary powers could not be regarded as an honour, but rather ‘a snare and an insult’, to which Clodius is

⁷⁴ See above 170–1 and Introduction: 8.

⁷⁵ On the opposition to the *lex Gabinia* see Dio Cass. 36.24, 36.30–6; Plut. *Pomp.* 25.4–6; Vell. Pat. 2.32; Cic. *Leg. Man.* 52; to the *lex Manilia* see Dio Cass. 36.42–3; Cic. *Leg. Man.* 59, 60; Plut. *Pomp.* 30.4–5. On the reasons why the passage of the *lex Manilia* did encounter less resistance than the *lex Gabinia* the year before see Seager 1979: 38–9. Kallet-Marx, 1995: 318–20 underlines the more immediate issue of Pompey’s clashes with Metellus Creticus. On the opposition to the *lex Trebonia* see Dio Cass. 39.32, 39.34; Plut. *Cato min.* 43.2–3.

⁷⁶ Suet. *Jul.* 22.

⁷⁷ Cic. *Dom.* 20, 22, 52–3, 65, 129, *Har. resp.* 58–9, *Sest.* 57, 62, *Mil.* 73; Livy *Per.* 104; Vell. Pat. 2.38.6, 45.4; Plut. *Cato min.* 34.4–37.3, *Pomp.* 48.5, *Caes.* 21.3–4; Dio Cass. 38.30.5; App. *B. Civ.* 2.23 wrongly assigns the episode to 52 BC.

⁷⁸ On the most probable reasons for this assignment see Tatum 1999: 155–6.

reported to have contemptuously replied: 'Well, then, if you do not regard it as a favour, you shall make the journey as a punishment.'⁷⁹ In 58 BC the attitude towards extraordinary commands had not changed. Cato, Plutarch reports, was almost forced to accept it, since Clodius went 'at once before the people and obtained an edict sending Cato on the mission'.⁸⁰ The year after, Cicero thundered against Clodius that this had been an iniquitous law, which involved the Roman people in a criminal act, and if Velleius Paterculus is correct in claiming that the senate ratified it, it was most probably only to acquiesce in a *fait accompli*.⁸¹

Contrary to Cicero's almost idyllic picture, dissent and alarm were also raised against the conferral of the *cura annonae* (*per quinquennium omnis potestas rei frumentariae toto orbe terrarum*) on Pompey in 57 BC.⁸² This was a special magistracy in charge of the food supply, whose competence comprehensively stretched to include the control of ports, markets and the grain routes throughout Roman dominion, with a tenure of five years.⁸³ It was a command of a military nature, which Pompey exercised by means of an *imperium pro consule*, in many respects equivalent to the *imperium* he had already held in 67 BC. It was equal, and not superior, to that of the governors of the provinces on whose jurisdiction he could encroach, and did not seem to have an explicit geographical delimitation (even if most likely outside Italy it extended mainly to the granary provinces: Sicily, Sardinia and Africa). As in 67 BC against the pirates, he also had the faculty of appointing fifteen *legati* to be distributed among the provinces while he superintended the whole.⁸⁴ Given the sharp rise in food prices and fear of famine, Cicero's proposal of special powers to Pompey was received with great acclaim of the people and the support of some *boni*, or at least so Cicero claims.⁸⁵

⁷⁹ Plut. *Cato min.* 34.3; Dio Cass. 38.30.5. Caesar, according to Cicero, congratulated him for 'on having deprived him for the future of all the opportunities of speaking his mind on the subject of extraordinary commands' (Cic. *Dom.* 22).

⁸⁰ Plut. *Cato min.* 34.3.

⁸¹ Cic. *Dom.* 20. Vell. Pat. 2.38.6 is the only source that refers to the passage of a *senatus consultum* regarding Cato's mission. Badian 1965: 117 considers this information correct and views it as a desperate attempt by the senate to acquiesce in a *fait accompli* already determined by the tribune's proposal and the ratification by the *comitia*.

⁸² Cic. *Att.* 4.1.6–7, *Fam.* 1.1.3, *Dom.* 3, 9–11, 16, 19, 27, 129; Livy *Per.* 104; Plut. *Pomp.* 49.4–5; Dio Cass. 39.9.2–3, 39.24.1.

⁸³ Plut. *Pomp.* 49; Dio Cass. 39.9.

⁸⁴ App. *B. Civ.* 2.18 talks about twenty *legati*. On the content of this law see also Seager 1979: 107–9. Rotondi 1912: 402 defines it as *infinutum*. For a full discussion of the issue see Balsdon 1957: 16–18 and Ridley 1981: 285, 293.

⁸⁵ Cic. *Att.* 4.1.6, in which Cicero is at pains to convince Atticus that the *boni* too favour the conferral of the extraordinary magistracy upon Pompey.

However, not only, as Cicero himself was forced to admit, did one praetor and two tribunes desert the meeting in opposition to the proposal,⁸⁶ but rumours also circulated concerning both the real aims behind the support of the consul Spinther for Pompey (apparently, a desire to confine the powerful general to a higher office so as to have free rein in the affair of King Ptolemy), and the origins of the scarcity of grain, which, according to Clodius, had been caused on purpose in order to boost Pompey's power.⁸⁷ Regardless of their reliability, these rumours were all signs of widespread anxiety at the proposal. However, the most revealing indicator of such a sense of unease and lack of uniform support for the measure was the fact that, while the consuls were drafting their bill, the tribune of the plebs Messius advanced an alternative measure. Messius, who a few months earlier was among the most fervent activists for Cicero's return, proposed that Pompey's *cura annonae* should have provided him with an *imperium maius* over the other provincial governors for five years, and full command over the fleet, the army and the financial resources of the *aerarium*.⁸⁸ Messius' proposal was met with unrestrained fury, since the measure as presented was completely unacceptable.⁸⁹ By comparison, the consuls' bill seemed a much more modest and palatable proposal. Most probably, Messius' move had been contrived to win over the consensus of those who, worrying about the excessive powers in the hands of Pompey, were opposed to the measure. By presenting the prospect of an unviable alternative, which would effectively have made Pompey the master of the whole empire, the supporters of this extraordinary command had created a scenario which led their adversaries to appreciate the consuls' draft as the best available solution. Once again, the conferral of extraordinary powers had polarised the political scene, and considerable resistance had to be overcome by those who wished to implement it.

The second important fact to observe is that all those who opposed the conferral of extraordinary powers claimed that the implementation of this measure went against the very foundation of the *res publica* and its liberty. In debating the issue, often (although not solely) before the people, all those speakers who opposed this measure advanced the same major claim: the conferral of extraordinary powers on an irregular magistrate was detrimental, so they claimed, to Roman *libertas*.

⁸⁶ Cic. *Att.* 4.1.6. On senatorial hostility towards Pompey's appointment see Cic. *Dom.* 15–19, *Att.* 4.1.7, 1.19.4, *Q. fr.* 2.5.3, 3.8.4; Brutus fr. 16 (Malcovati 1955: 463 = Quint. *Inst.* 9.3.95); Plut. *Pomp.* 49.4ff.; Dio Cass. 39.9.2–3. Gruen 1995: 536 diminishes the amount of opposition to the law.

⁸⁷ Plut. *Pomp.* 49. Pompey's new role meant that the distribution would no longer be the task of the *vici* and of Sex. Cloelius; Nippel 1995: 76 ff.

⁸⁸ Dio Cass. 39.9.2; Plut. *Pomp.* 49; Cic. *Att.* 4.1.6.7. Mommsen 1887: II.1, 672. ⁸⁹ Cic. *Att.* 4.1.7.

In doing so, they had recourse to a wide variety of rhetorical strategies. Not only did they equate directly the conferral of extraordinary powers with the establishment of a government of one man, but they also referred to events of a more or less mythical past to incite the contemporary defence of Roman liberty. When words seemed ineffective, the opponents of the extraordinary powers even resorted to staging scenes of political theatre, which through powerful visual symbolisms showed the spectators who were the true violators of *libertas*.

In a speech attributed to him by Dio, Catulus, after touching upon a wide variety of arguments, concentrated his opposition to the *lex Gabinia* on an essential point: the concentration of powers in the hands of a single individual undermined the very foundation of the *res publica*. Catulus' concern was not Pompey's ability, which he did not doubt, but rather that he was now becoming 'too great for a free *res publica*'.⁹⁰

He aimed at showing that Gabinius' proposal, contrary to his suggestion, was neither wise nor advantageous: 'Who does not see that it is neither appropriate nor advantageous to entrust affairs to one man, and make one man master of all the good things that belong to us, even if he is an excellent man?'⁹¹

Nor was Catulus alone. His anxieties about the convergence of so much power in the hands of one individual were shared by other senators. The tribune Roscius came forward to speak out against the measure but 'no one would listen to him. He therefore made signs with his fingers that they should not choose Pompey alone to this command, but give him a colleague.' The crowd raised such a deafening roar that a bird fell from the sky and Roscius withdrew in silence.⁹²

Hortensius, a close ally of Catulus, is reported to have spoken *permulta* against Gabinius' proposal.⁹³ Although nothing can be said about his speech, on the basis of his association with Catulus in this struggle and his argument against the *lex Manilia* (which bestowed extraordinary powers upon Pompey in his fight against Mithridates), his line may be assumed to have been similar to that of Catulus. Although Pompey was without doubt a general of great skill, he might have claimed, it was not appropriate to confer so much power on one man only.

Adding to the powers conferred by the *lex Gabinia*, not yet elapsed, the year after the *lex Manilia de imperio Pompeii* proposed to assign Pompey a *proconsulare imperium* over the eastern provinces of Cilicia, Asia, Bithynia

⁹⁰ Vell. Pat. 2.32. ⁹¹ Dio Cass. 36.35.

⁹² Plut. *Pomp.* 25.6; Dio Cass. 36.30.3. ⁹³ Cic. *Leg. Man.* 52.

and Pontus as well as the command over the war against Mithridates until the accomplishment of the task.⁹⁴ With the grant of the faculty to make peace and war wherever he wished, and without any temporal restriction, it appeared as if the law was about to place 'the Roman supremacy entirely in the hands of one man'.⁹⁵

As soon as Manilius advanced his proposal, 'indignation and opposition were manifest even then on the part of the *optimates* (παρὰ τῶν δυναστῶν), particularly because Marcius and Acilius [the previous generals in office] were being removed before the period of their command had expired'.⁹⁶ The fact that Lucullus had been unjustly treated, robbed, as it were, of his deserved military glory, 'was of less concern to the aristocratic party (ἀριστοκρατικοί). They were, however, displeased at the power given to Pompey, which they regarded as establishing a tyranny, and privately exhorted and encouraged one another to attack the law, and not to desert their freedom (ἐλευθερίᾳ)'.⁹⁷ It was a matter of liberty and they ought not to surrender.

Hortensius openly attacked the proposal by adopting the same line of argument as the one employed in the previous year both before the senate and before the people, against the conferral of a special command against the pirates on Pompey. 'If one man is to be out in supreme command,' Hortensius is reported to have claimed, 'the right man is Pompeius; but that supreme command ought not to be given to one man'.⁹⁸ However, this argument, as well as the idea that 'no innovation [should] be made contrary to the usage and the principles of our forefathers',⁹⁹ were easily dismissed, since, as Cicero pointed out, they were now superseded by events (referring most immediately to the *lex Gabinia* of the year before). Cicero pursued a very similar line of argument when in 57 BC he faced the opposition to the assignation of the *cura annonae* to Pompey. In this case too, those who opposed the conferral of these extraordinary powers on Pompey claimed that they were prepared to concede that if need arose for such a high concentration of powers in the hands of only one individual, Pompey would have been the most suitable person to whom these powers should be entrusted; but that they opposed the measure per se as it would have put one individual in the position of domination over the rest of the *res publica*.¹⁰⁰ Cicero could respond to them that 'the triumphs of Gnaeus Pompeius, by which that great man, summoned by an extraordinary mandate to the

⁹⁴ Livy *Per.* 100; Plut. *Pomp.* 30.1, *Luc.* 35.7; App. *Mith.* 97; Dio Cass. 36.42.4–43.5. On the chronological limit of this command see Ridley 1981. On the provinces see Ridley 1983.

⁹⁵ Plut. *Pomp.* 30. ⁹⁶ Dio Cass. 36.43. ⁹⁷ Plut. *Pomp.* 30.

⁹⁸ Cic. *Leg. Man.* 52. ⁹⁹ Cic. *Leg. Man.* 60. ¹⁰⁰ Cic. *Dom.* 19.

defence of his country (*extra ordinem ad patriam defendendam vocatus*), added lustre to the name and honour to the *imperium* of the Roman people (*auxit nomen populi Romani imperiumque honestavit*), had been essential for the preservation of the free commonwealth and its empire.¹⁰¹ Pompey had so successfully showed the necessity and appropriateness of extraordinary powers to solve a very difficult and dangerous task, that opposing the conferral of these powers, Cicero claims, was tantamount to opposing the *nomen et imperium Romani populi*.

In 59 BC, Cato adopted a very similar argument to that of Catulus and Hortensius against the *lex Vatinia* which conferred upon Caesar the command over Cisalpine Gaul and Illyricum with three legions, the right to elect his own *legati* and the disposal of a fixed sum of money from the public *aerarium* for five years. Faced with the enthusiasm of the people, Cato warned them 'that they themselves by their own votes were establishing a tyrant in their citadel'.¹⁰² The year after, Cicero despaired when Clodius succeeded in passing a law which bestowed extraordinary commands on the consuls Piso and Gabinius over respectively Macedonia and Syria (the latter being a replacement for Cilicia, the original choice), claiming that no free people were left in the Roman Forum.¹⁰³

When in 52 BC as a consequence of an ungovernable situation of public disorder that followed Clodius' murder Pompey was appointed *consul sine collega* (the first of consuls who had 'two of the greatest provinces, an army, public money, and autocratic power in the city by virtue of being sole consul'),¹⁰⁴ a strong opposition immediately rose again. Brutus exclaimed that 'It is better to rule no man than to be the slave of any, for one may live honourably without ruling, but there is no way of living as a slave.'¹⁰⁵ Cato too opposed this proposal by adding that Pompey should not preside over the elections, since 'the laws ought not to derive their security from Pompey, but Pompey from the laws'.¹⁰⁶ However, forced to admit that 'any government is better than no government',¹⁰⁷ Cato suggested that it would be better to appoint him consul 'without colleague, so that by ruling alone he might have the power of a dictator with the responsibility of a consul', always bearing in mind that he had received it as a gift from the senate.¹⁰⁸

¹⁰¹ Cic. *Dom.* 19–20. ¹⁰² Plut. *Cato min.* 33.3. ¹⁰³ Cic. *Red. sen.* 18.

¹⁰⁴ App. *B. Civ.* 2.23. See also Dio Cass. 40.50.4; Plut. *Cato min.* 47.3; Asc. 35–6C.

¹⁰⁵ For the probable, but ultimately uncertain, dating of the speech to 52 BC see Brutus fr. 16 (Malcovati 1955: 463 = Quint. *Inst.* 9.3.95).

¹⁰⁶ Plut. *Cato min.* 47.1–2. For a similar argument see Sall. *Hist.* 3.34.24Mc and McGushin 1994: *ad loc.*

¹⁰⁷ Plut. *Cato min.* 47.3. ¹⁰⁸ Plut. *Cato min.* 47.1–3; Dio Cass. 40.50.4; App. *B. Civ.* 2.23.

In their attempt to win the case against the conferral of *potestates extraordinariae*, orators also had recourse to references to Rome's mythical past to illustrate that the assignation of these powers would inevitably have led to a loss of the commonwealth's *libertas*.

Speaking probably from the Rostra against the *lex Gabinia*, which conferred extraordinary powers on Pompey to fight against the pirates, the consul Piso declared that if Pompey wished to be a new Romulus, he had to be aware that he would share his destiny.¹⁰⁹ Piso was alluding to the tradition according to which Romulus, whose tomb in the immediate vicinity might have provided a visual support to his point,¹¹⁰ had been torn to shreds by senators. By association, he indirectly claimed that the conferral of extraordinary powers on Pompey to fight the pirates would have established him above the rest of the senators, and was tantamount to the setting up of an odious kingship.¹¹¹

The year after, in 66 BC, when the opposition to the *lex Manilia* was about to resign itself to defeat, paralysed by fear of the multitude, only Catulus had the strength once again to denounce the law before the people.¹¹² Realising he was about to lose his battle, Catulus adopted an exceptional appeal. 'He called out in loud tones from the rostra urging the senate again and again to seek out a mountain, as their forefathers had done, or a lofty rock, whither they might fly for refuge and preserve their freedom.'¹¹³

Directed to anyone in the audience whom Catulus could hope to persuade (senators, in the first place, but also the plebeian multitude, although the sources report it as on the whole favourable to the measure), he alluded to the so-called second secession of the plebs to the Aventine or the Sacred Mount. In the fifth century BC, according to tradition, this secession brought an end to the tyranny of the decemvirs, who, after a first year when they had successfully drawn up a legal code, began to oppress the commonwealth with their tyrannical behaviour, and whose elimination eventually re-established the liberty of the *res publica*. Adopting an appeal traditionally applicable to the realm of popular politics, which referred to the plebeian struggle for liberty, Catulus exhorts his audience to fight

¹⁰⁹ Plut. *Pomp.* 25.4.

¹¹⁰ A tradition recorded by Varro located Romulus' tomb on, or in the immediate vicinity of, the Rostra: see Coarelli 1983–5: 1 167, and more generally 166–78 and 188–9, who cites Ps.-Acr. and Porphyry both *ad* Hor. *Epod.* 16.13–14.

¹¹¹ Romulus as senatorial victim: Cic. *Rep.* 2.20; Livy 1.16; Dion. Hal. *Ant. Rom.* 2.56.3–4; Plut. *Rom.* 27.3–28.3. See Frascchetti 2002, Ver Eecke 2009 and Martínez-Pinna Nieto 2011.

¹¹² The precise context of this *contio* is unknown. Pina Polo 1989: 289 n.252.

¹¹³ Plut. *Pomp.* 30.4. Millar 1998: 86 and Morstein-Marx 2004: 183 underline the paradox in Catulus' appeal.

in order to preserve the liberty of the whole commonwealth, not just of a section of it.¹¹⁴ As the decemvirs, in their unwillingness to relinquish their consular *imperium* and their tyrannical behaviour, were exercising a form of domination over the *res publica*, so the conferral on Pompey of extraordinary powers by the *lex Manilia* would have subjected the whole commonwealth to his domination.

When the opposition realised that the circumstances were unfavourable for winning the struggle against extraordinary powers by rhetorical arguments, it resorted to symbolic acts, which allowed them to portray their adversaries as behaving in a manner contrary to Republican tradition.¹¹⁵ In 55 BC, the passage of the *lex Trebonia*, which assigned the provinces of Spain and Libya to Pompey (which he was allowed to govern through *legati*) and that of Syria to Crassus for five years, with the faculty to raise an army, maintain a naval force and independently declare war and peace, once again provoked strong opposition. Although all those with vested interest in the law had managed to silence their rivals by intimidation, M. Cato and M. Favonius, supported by two tribunes Ateius Capito and Aquilius Gallus, succeeded in making their opposition felt.¹¹⁶

On the very day of voting, during a final *contio* C. Trebonius allowed M. Favonius and M. Cato to present their case in opposition to the proposal, assigning one hour to the former and two to the latter.¹¹⁷ However, rather than spending the time assigned to criticise the content of the law, Favonius devoted the whole hour at his disposal to complaining against the fact that too little time had been assigned to him. Cato, for his part, aware that he would not have been able to persuade the audience, spent the time allocated to him crying out against the general situation in which the *res publica* now found itself. When Trebonius pulled him down from the rostra to cut him off, Cato was able to provide his audience with a powerful image of his demonstration: Trebonius was behaving in a tyrannical fashion against Republican tradition, as by force he had deprived him of the possibility of dealing with the main core of the question. Rather than concentrating on the law itself, Cato orchestrated a scene that would show anyone present who was the true enemy of Roman

¹¹⁴ For a similar interesting appropriation of this tradition see Cicero's use of the history of the tribunate and struggle of the orders: *Corn.* 1, fr. 48–52 Cr. Cf. Sall. *Jug.* 31.17; Macer in Sall. *Hist.* 3.34.1Mc, 3.34.12Mc, 3.34.15Mc, 3.34.17Mc.

¹¹⁵ Morstein-Marx 2004: 184.

¹¹⁶ Dio Cass. 39.33–4. Pompey's and Crassus' actions could be described in the same ideological framework as enemies of liberty: Plut. *Crass.* 15.2.

¹¹⁷ See Dio Cass. 39. 34 and 39.32; Pina Polo 1989: 303 n.320.

liberty.¹¹⁸ Providing a powerful visual demonstration of his objection, he provoked Trebonius into pulling him down from the rostra in order to stop his filibustering. The direct confrontation that ensued made Trebonius resort to even more extreme measures, expelling Cato from the Forum and taking him to prison. When a sympathetic crowd gathered around to listen to Cato's grievances, Trebonius realised the symbolic impact of his actions and, frightened, released his adversary.¹¹⁹ It was clear in the eyes of all present that those who proposed the bestowal of exceptional powers upon one individual were in reality enemies of Roman *libertas*.

The imperial Greek commentators on Roman political life encapsulated quite well the spirit of those who saw in the extraordinary powers one of the causes of the end of the free *res publica*. As Plutarch comments, the *lex Gabinia* provided Pompey with an 'out-and-out monarchy and irresponsible power over all men'.¹²⁰ Summarising Cicero's actions in support of Pompey's *cura annonae*, Plutarch claimed that 'by his advocacy of the corn law [Cicero] in a manner once more made Pompey master of all the land and sea in Roman possession',¹²¹ an idea echoed in Dio who commented 'so now in the case of the grain supply, as previously in the case of the pirates, [Pompey] was once more to hold sway over the entire world then under the Roman power'.¹²²

Analysing these politicians' claims, it becomes apparent that they all stated that the bestowing of extraordinary powers upon one individual jeopardised the very foundation of the *res publica* and its true liberty in the following ways: first, by conferring excessive powers in the hands of one individual, this measure contravened Roman custom; second, it removed any form of institutional constraints on the power of the individual who was left to exercise it at his will; third, it annulled the principle of equal share of power amongst magistrates; fourth, it violated the idea of the distribution of power amongst institutional bodies of the *res publica*; and, finally, it left the commonwealth more vulnerable as no one else would have been allowed to gain practical experience.

First, they all claimed that this sort of measure conferred an excessive amount of powers on an individual and was against the Roman *mos maiorum*.¹²³ In 43 BC, opposing the conferral of extraordinary powers on

¹¹⁸ Morstein-Marx 2004: 184–5. The opposition against the triumvirs was perceived more generally as a matter of liberty. Just before the introduction of the *rogatio Trebonia*, encouraging Lucius Domitius to put forward his candidacy for the consulship, Cato had 'persuaded him not to desist, for the struggle with the tyrants, he said, was not for office but for liberty' (Plut. *Pomp.* 52.1).

¹¹⁹ Plut. *Cato min.* 43.2–3; Dio Cass. 39.34.4.

¹²⁰ This is the lapidary description in Plut. *Pomp.* 25.2, clearly echoing the optimate bias of his source.

¹²¹ Plut. *Pomp.* 49.4. ¹²² Dio Cass. 39.9. ¹²³ For example, Dio Cass. 36.35; Cic. *Phil.* 11.17–18.

P. Servilius Isauricus to fight against P. Cornelius Dolabella, Cicero described the proposal as dangerous. Presenting a line of argument perfectly consistent with the ideas and values of those who had in previous years resisted the bestowal of these powers, Cicero claimed that extraordinary commands were a *popularis* affair, which, marked by fickle inconsistency, were not suited to the *gravitas* of the senate.¹²⁴ Forgetting the instrumental role that he himself had played in securing the success of some of them, Cicero continued to argue that Pompey's career had been punctuated by extraordinary commands as a result of the activity of seditious tribunes. The only time, he claims, that the senate had itself played an active role in granting these powers, its actions were almost forced by the consuls' refusal to act, to the extent that the senate had dispatched Pompey to fight Sertorius 'not as proconsul, but in place of the consuls', as L. Marcius Philippus is reported to have said.¹²⁵

In the past, Cicero claimed, the greatest wars did not require this kind of power, but were won thanks to the talent of duly appointed consuls or dictators. Not even in the case of the war against Aristonicus, 'did the Roman people entrust the war to a private individual, though Africanus was available, who had celebrated his triumph over Numantia the previous year. Despite standing far above everybody in military renown and ability, he carried only two tribes. So the Roman people gave the conduct of the war to the consul Crassus in preference to the private citizen Africanus.'¹²⁶

The recourse to these powers was allowed only when dictated by extreme circumstances, that is, when current affairs rendered it absolutely necessary, as had been the case with Gaius Caesar, the adopted son of Julius.¹²⁷ 'The veteran soldiers who, following his authority, command, and name, had taken up arms on behalf of the Republic wished to be commanded by him; the Martian Legion and the Fourth Legion had given their support to the authority of the senate and the dignity of the Republic, but at the same time they demanded Gaius Caesar as their general and leader. The necessity of war gave Gaius Caesar the command, the senate only gave him the official rods.'¹²⁸ These powers, Cicero argues, were not granted to Caesar, but rather practically snatched away by him. Ancestral precedent, he claimed, did not favour the bestowal of extraordinary powers, but rather preferred operating within the existing legal and institutional practices.

¹²⁴ Cic. *Phil.* 11.17.

¹²⁵ Cic. *Phil.* 11.18. For the association of *turbulentus* and *popularis* activity see Hellegouarc'h 1963: 531–2 and Arena 2011b. Cicero also reports L. Marcius Philippus' remark in his speech in favour of extraordinary commands for Pompey against Mithridates. See *Leg. Man.* 62; cf. also Plut. *Pomp.* 17.4.

¹²⁶ Cic. *Phil.* 11.17.

¹²⁷ Cic. *Phil.* 5.45. See Manuwald 2007: *ad loc.*

¹²⁸ Cic. *Phil.* 11. 20.

This was also the argument that Cicero had adopted against the *lex Clodia* in 58 BC, which assigned to Piso and Gabinius extraordinary commands over Macedonia and Syria respectively (the latter being a replacement for Cilicia). Associated to the provinces were special powers that extended over the traditional boundaries and included the right to elect their own *legati*, and perhaps also the right to enlist troops.¹²⁹ The extraordinary nature of the command over these provinces did not reside in the time limit of the governors' *imperium*, but rather in the procedure with which these powers had been granted. In Syria, in fact, M. Aemilius Scaurus had been proconsul from 65 to 62 BC, L. Marcius Philippus from 61 to 60 BC, Lentulus Marcellinus from 59 to 58 BC, while in Macedonia L. Manlius Torquatus had held his pronconsulship between 64 and 63 BC, C. Antonius Hybrida between 62 and 60 BC, C. Octavius between 60 and 58 BC and L. Apuleius Saturninus between 58 and 57 BC.¹³⁰ Instead, in defiance of the *lex Sempronia*, two sitting consuls (and in Cicero's opinion two public pests) had been appointed to the provincial governorship without consultation of the senate or recourse to the lot.¹³¹

The claim that extraordinary powers went against the established custom of the ancestors could easily be dismissed by showing the changing nature of the *mos maiorum*, in itself an ever-moving entity. It is unsurprising, perhaps, that the most eloquent and lucid response to this criticism was articulated by Cicero himself.

Speaking in support of the *lex Manilia*, Cicero, then praetor in charge, focused on the necessity to wage war to preserve the empire, on the dangerous nature of a war of this scale, and on the proven ability of Pompey, the most competent and gifted general to fight it.¹³² Recasting the whole issue in these terms, Cicero not only claimed that the commonwealth should take advantage of Pompey's ability in his lifetime, while the gods allowed it,¹³³ but also maintained that no contravention of *mos maiorum* would be carried out. The ancestors, Cicero maintains, 'always bowed to precedent in peace but to expediency in war, always meeting fresh emergencies with fresh developments of policy'.¹³⁴ Recalling past innovations (such as the extraordinary commands conferred on Scipio against Carthage and Numantia), which allowed Rome to build and preserve its empire, Cicero underlines the foresight of those who supported and implemented them,

¹²⁹ Cobban 1935: 94. See also Cic. *Sest.* 33. ¹³⁰ See Gruen 1974: 537–9. ¹³¹ Cic. *Dom.* 24.

¹³² Cic. *Leg. Man.* 51. Steel 2005: 124–5 provides the best analysis of Cicero's speech. See also Lintott 2008: 45–9. Cf. Cic. *Orat.* 102.

¹³³ Cic. *Leg. Man.* 59. ¹³⁴ Cic. *Leg. Man.* 60.

such as in very recent years those leading citizens currently opposing the Manilian *rogatio*, Quintus Catulus and others of the same rank.¹³⁵ If the Romans had not shown this level of flexibility, the empire would be something of the past. Speaking of the previous year, if the advice of those who opposed the conferral of extraordinary powers to Pompey against the pirates had prevailed, 'if, on that occasion, the Roman people had thought more of the opinion [of those who opposed the *lex Gabinia*] than of their own welfare and their true interests, should we today be in possession of our present glory and our world-wide *imperium* (*ipsius populi Romani salus et vera causa valuisset, hodie hanc gloriam atque hoc orbis terrae imperium teneremus*)?'¹³⁶

The second claim all opponents to this kind of measure made was that the conferral of extraordinary powers on a single individual was incompatible with liberty, because it removed any form of constraint upon the action of that individual in whose hands lay such a high concentration of power, thereby placing him in a position of domination which he could exercise at his will. Once these powers were conferred, the only tool which remained available to curb the powers of the commander was his own virtue and moderation. History had shown, as Catulus is presented arguing in 67 BC, that human nature is rather weak and easily allured to the fascination of unconstrained power.

Speaking against the *lex Gabinia*, Dio makes Catulus claim that 'it is not proper to entrust to any one man so many positions of command one after the other. This is, first of all, forbidden by the laws, which are regarded as one of the means to preserve liberty, and secondly has been found by experience to be most perilous.'¹³⁷ If a situation is such as to require a special magistracy, Catulus continued, they could 'without either transgressing the laws or forming plans in disregard of the commonwealth (μήτε παρανομήσασι μήτ' ὀλιγώρως ὑπὲρ τῶν κοινῶν βουλευσάμενοις), elect Pompey himself or anyone else as dictator'. However, in doing so, they should abide by their fathers' customs, and make sure that he should not 'hold office longer than the appointed time, nor outside of Italy'.¹³⁸

The recent past, Catulus' argument continued, had already shown the vulnerability of human nature. Once used to power for a long period of time, men were affected by insatiable greed and no longer willing to abide by ancestral customs. Marius, consul seven times over a short period of

¹³⁵ Cic. *Leg. Man.* 62–3. ¹³⁶ Cic. *Leg. Man.* 53.

¹³⁷ Dio Cass. 36.31. Dio's Catulus repeats that the conferral of extraordinary powers is against the laws at 36.32 (twice); 33 (in opposition to regular appointments); 34; 36.

¹³⁸ Dio Cass. 36.34.

time, and Sulla, in command of an army for many consecutive years, first as dictator and then as consul and proconsul, were two amongst the most recent examples of the inability to follow ancestral precedent. The anxiety over Pompey's behaviour once so much power had been bestowed upon him was widely shared amongst the members of the elite, and the figure of Sulla recurred frequently as admonition to Pompey (especially after the war in the East). When Crassus and Cato had warned against Pompey coming back as a new Sulla, what they implied was that the great amount of power conveyed upon him could permit him to behave as a *dominus*.¹³⁹ To these accusations, he replied that 'he had received every office earlier than he had expected, and laid it down more quickly than others had expected, adding that his disbanding of the armies was a continuous testimony to the truth of his words'.¹⁴⁰

A third claim all politicians made in opposing the conferral of extraordinary commands was that they threatened the liberty of the commonwealth because they annulled the notion of equal share of power amongst magistrates, that is they violated *par potestas*, one of the guarantees of *libertas*.¹⁴¹ Arguing in the senate against the conferral of an extraordinary command to Servilius Isauricus, Cicero claimed that the recourse to these powers was not appropriate to the senate's *auctoritas*, as it brought elections into the senate. What this meant was that it brought competition, an element intrinsic to election, into a place where equality of *dignitas* amongst its members was supposed to be at the foundation of the system, and assigned to only one of its members the honour of being a beneficiary of these special powers, thus elevating him over the rest. 'Well, if elections are to be held in the senate, let us present ourselves as candidates, let us canvass, but let us be given a ballot as are the people. Why put us in such a dilemma, [Lucius] Caesar, that it will appear that a most eminent personage has been rejected if your motion fails, or each one of us will seem to have been passed over if we are not deemed worthy of the same honour though equals in rank (*si, cum pari dignitate sumus, eodem honore digni non putemur*)?'¹⁴²

The same claim is also advanced by Dio's Catulus in his opposition to the *lex Gabinia*. In his opinion, the bestowal of extraordinary powers to Pompey would have undermined one of the principles that guaranteed the working of the *libera res publica*. By referring to the democratic character of

¹³⁹ Vell. Pat. 2.40; Plut. *Pomp.* 43–4, 46, *Cato min.* 26.4; Dio Cass. 37.43–4, 37.49–50.

¹⁴⁰ Plut. *Pomp.* 54.1. On this source see also Pelling 1979, Geiger 2000: 219 and van der Blom 2011: 564.

¹⁴¹ Wirszubski 1950: 23.

¹⁴² Cic. *Phil.* 11.19. Cf. discussion on Cato's and Scipio's fragments Chapter 3: 142–3.

the notion of arithmetical equality, which Dio applies here to the members of the elite, Catulus, in the words attributed to him by the Greek writer, claims that this command should bring the same honour to all members of the senatorial elite, who are equally worthy of it.¹⁴³

Another reason, they all claimed, why the conferral of extraordinary powers endangered Roman liberty was that by centring all powers in the hands of one individual (as the assignation of these powers might be plausibly described) these special commands would violate the notion of power distribution amongst the different institutional bodies of the *libera res publica*.

This is the reason why almost every opposition against these powers focused its attention on the right reserved to the chosen commander to appoint his own *legati*, as well as on the marginalisation of those magistrates regularly elected whose powers were subsequently usurped by the appointment of the special general. In opposing the *lex Gabinia* Catulus, in the words assigned to him by Dio, underlined how it would be much more just and advantageous (δικαιότερον καὶ συμφωρότερον) that the general's legates, destined to serve under him, were chosen by the Roman people beforehand, in such a way as to receive independent authority (ἡγεμονία) from the people themselves.¹⁴⁴ If this were to be the case, the legates would not depend entirely on Pompey, but rather, feeling responsible for their actions, would compete in glory and excel.¹⁴⁵

Nor should the senate, as Cicero claimed in opposing the *lex Vatinia*, be deprived of its function in appointing (or, at least, ratifying the appointment of) the general's legates. Vatinius had been appointed *legatus* of Caesar by his own law, which thereby divested the senate of one of its most important functions. 'Did the Republic,' Cicero railed against Vatinius, 'appear so miserable and prostrate, that the senate was no longer able to appoint, in conformity with the uniform precedent of our ancestors, the messengers of peace and war, and managers, and interpreters, and authors of warlike determinations, and ministers of the different sorts of provincial duty?'¹⁴⁶ Cicero was forced to admit that in the past there had been occasions when the people had selected a general, but 'who ever heard that lieutenants have been appointed without a resolution of the senate to authorize it?' To worsen Vatinius' case, Cicero continued, his example had been followed by Clodius, when he proposed a law which allowed Piso and Gabinius,

¹⁴³ Dio Cass. 36.32. On Dio's political vocabulary see Freyburger-Galland 1997: esp. 116–22. On geometric equality Nicolet 1976 and Chapter 3: 101ff.

¹⁴⁴ Dio Cass. 36.36. On the relation of the *legati* with their superiors see Thomasson 1991: esp. 17–22.

¹⁴⁵ On Pompey's deployment of *legati* see also App. *Mith.* 94. ¹⁴⁶ Cic. *Vat.* 35.

the two pestilences of the Republic, to choose their own *legati* without any recourse to the senate.¹⁴⁷

The conferral of the extraordinary command upon one individual, in whose hands resided the capacity to appoint his *legati*, was contrary to the distribution of power amongst different institutional bodies, a distribution which was considered essential to the preservation of the liberty of the *res publica*.

The key point, Catulus emphasises, lies in the role that the conferral of extraordinary powers reserves to the *comitia*. Referring to the shared notion that a magistracy is a *beneficium populi*, Dio's Catulus underlines that one of the main questions that the *lex Gabinia* poses is 'whether actual commanders or assistants should be sent, whether generals or lieutenants, and whether they should be commissioned by the entire populace with full authority, or by the commander alone for his assistance'.¹⁴⁸ The Roman people, gathered in their institutional body of the *comitia*, regularly elected magistrates, who could well fulfil the duties that this law was now bestowing upon a private individual. Throwing away all the offices regularly instituted in accordance to law under the pretext of the threat of the pirates,¹⁴⁹ the *lex Gabinia* deprived the comitial activity of any meaning: 'To what end, indeed,' Dio makes Catulus ask, 'do you elect the annual officials, if you are going to make no use of them for such occasions? Surely not that they may stalk about in purple-bordered togas, nor that, clothed with the name alone of office, they may be deprived of its duties. How can you fail to arouse the enmity of these and all the rest who have a purpose to enter public life at all, if you overthrow the ancient offices and entrust nothing to those elected by law, but assign some strange and hitherto unheard-of command to a private individual?'¹⁵⁰ This practice would be dangerous because it would also give reason for discontent amongst the members of the elite, who, rather than competing for glory with one another by fighting against the common enemy, would probably stir up internal strife.¹⁵¹

In addition to this very negative feature, Catulus emphasised an additional pragmatic disadvantage inherent in Gabinus' proposal, but one

¹⁴⁷ Cic. *Vat.* 36. Dio Cass. 36.37.1 reports that in the case of the *lex Gabinia* the senate had unwillingly given its ratification.

¹⁴⁸ Dio Cass. 36.36. Cf. Cic. *Leg. Man.* 57. See App. *B. Civ.* 2.28: in 50 BC in a letter to the senate Pompey, in whose hands an enormous amount of power was concentrated, states that unless the people who had given him that power wants it back he would not resign. See also [Chapter 2](#).

¹⁴⁹ Dio Cass. 36.36. ¹⁵⁰ Dio Cass. 36.33.

¹⁵¹ This point could also be adumbrated in the fragment usually attributed to Catulus' speech 'nor will his task as monarch over all your possessions be free from envy': see Bekk. *Anecd.* 157.30.

which betrays a very important ideological point. By putting all powers in the hands of only one man, Catulus' argument ran, no other individual would be given the opportunity to gain practical experience. It followed that the number of skilled generals would inevitably decrease, deepening further the current dearth of excellent generals. Furthermore, Catulus added, if Pompey lost his touch, no one else would be available to take over. As reported by Xiphilinus in a much-repeated anecdote, when Catulus, advising the people to spare such a man and not expose him to successive wars and perils, asked them 'Whom else will you have if you lose him?' the answer was a resounding 'You.'¹⁵² If, on the one hand, the people's reply may be interpreted as a public assertion of the popular right to choose whoever they wish as the defender of their interests, on the other, Catulus' question highlights that the *libera res publica* could not rely solely on one individual. In order to function properly and preserve its liberty, the *res publica*, it is implicitly argued, operated on a system of power distribution ingrained in its institutional framework.¹⁵³

The basic assumption all politicians shared in opposing the conferral of extraordinary powers was that the distribution of power (however it was conceived) was an essential precondition to assure that no member (or part or institution) of the body politic gained such an enormous amount of power as to find himself unconstrained by any form of control, and thereby in the position, if he so wished, to exercise his domination over the civic community.

The whole debate in opposition to the extraordinary commands did not focus on the incompetence of the people to make important decision concerning the administration of the empire; nor was it argued on the basis of the importance of the notion of elite equilibrium, which, if upheld, would have guaranteed the senate's predominance over the commonwealth.¹⁵⁴ Rather, those who opposed the bestowal of exceptional powers claimed to be motivated by a defence of the shared value of *libertas*. They referred to the idea of the commonwealth's liberty as a status of non-subjection to the arbitrary will of either a foreign power or a domestic group or individual, and claimed that the conferral of extraordinary powers on one individual would have seriously endangered this status.

Even when these politicians, as in the case of Catulus, seemed to exhort directly the senators to act in defence of liberty by seeking out a mountain, as their forefathers had done, they were ideologically referring to

¹⁵² Plut. *Pomp.* 25.5–6. The anecdote is often recounted: Cic. *Leg. Man.* 59; Vell. Pat. 2.32; Val. Max. 8.15.9; Dio Cass. 36.36a (Xiphilinus); and seems confirmed also by Sall. *Hist.* 5.20Mc.

¹⁵³ Morstein-Marx 2009: 115–16. ¹⁵⁴ Morstein-Marx 2009: 116 and Yakobson 2009: 49–51.

the commonwealth's liberty from the domination of the politically current equivalent to the decemvirs of the 'mythical' past, rather than to the preservation of a liberty that encapsulated their privileges.¹⁵⁵

The idea of *libertas* to which they referred was understood as the basic notion of liberty shared by everyone in Rome, no matter what political tradition on liberty they might have appealed to. It was the idea of liberty as absence of the domination by a member of a community which both intellectual traditions on *libertas* shared, even if they differed on the institutional means they regarded as crucial to preserve it. Although by endorsing different notions of equality they differed on the criteria according to which power should be distributed amongst members, parts or institutions of the body politic, both traditions considered power distribution one of the essential means to preserve the liberty of the commonwealth.¹⁵⁶

This important fact allows us to identify the clever political tactic employed by the opponents to the conferral of extraordinary powers. By claiming that the implementation of this measure threatened Roman liberty, they could in essence show that their adversaries had failed to perceive that in the light of a common understanding of the value of *libertas*, a value they themselves cherished the most, their political behaviour could be plausibly described as liable to endanger liberty. Since those who proposed and supported the conferral of extraordinary measures professed to believe that policies which set up a potential *dominus* over the commonwealth had the effect of undermining political liberty, it follows not only that to oppose such measures must have been an act in defence of liberty, but also that everyone was in the condition of recognising and admitting to it.

THE SO-CALLED 'SENATUS CONSULTUM ULTIMUM'

One of the issues that consistently provoked fierce debate in the late Republic was the use of the so-called '*senatus consultum ultimum*' to deal with a situation of perceived emergency caused by a domestic crisis. Each time the issue was raised, the political scene was polarised; those who supported its use as appropriate strongly opposed the attacks of those who regarded it as against the Roman legal system. Each time these attacks were launched, those who supported the '*senatus consultum ultimum*' as an appropriate and efficacious tool to defend the *libera res publica* put up a strong resistance,

¹⁵⁵ Plut. *Pomp.* 30.4.

¹⁵⁶ See Chapter 3. Cf. Cic. *Rep.* 1.53: the speaker in support of aristocracy claims that all equality is impossible, since even democrats find themselves assigning position of honour unequally.

and each time they did so by claiming to be acting in defence of *libertas*.¹⁵⁷ The pages that follow are dedicated to the reconstruction of their claims.¹⁵⁸

The so-called '*senatus consultum ultimum*' was a decree of the senate that, in situations of crisis, advised the Roman magistrates as well as named private individuals 'to see to it that no detriment befall the commonwealth', and was ultimately used for highly political reasons as a means to eliminate political opponents.¹⁵⁹

Its designation as '*senatus consultum ultimum*', the highest decree of the senate, appears only twice in the ancient sources, once in Caesar's *de bello civile* and once in Livy's history, and, beyond the implicit assumption of a state of emergency, it does not seem to have carried any specific or concrete content.¹⁶⁰ It appears to have been an authoritative exhortation, however vague and generic, on the part of the senate to certain magistrates to defend the *res publica*. Rather than the conferral by the senate of full powers on magistrates who, in order to ensure that the *res publica* suffered no harm, were exempted under its banner from the limitations imposed on their power of *coercitio* (in particular the *ius intercessionis* and the *ius provocacionis*), it was, in essence, the senate's attempt to recall the magistrates to the fulfilment of their duties.¹⁶¹ From a technically legal point of view, the senate did not possess *imperium*, and could not therefore invest the magistrates with it.¹⁶² The senate's powers, however mighty, were political in essence; from a constitutional point of view, with the exception of the

¹⁵⁷ On the '*senatus consultum ultimum*' as an *optimates*' political means of intervention see Plaumann 1913, Mendner 1966, Rödl 1968, von Ungern-Sternberg 1970 and 2008, Burckhardt 1988, Duplá 1990a and Lintott 1999.

¹⁵⁸ On the issue of the sources to reconstruct these political debates see Introduction: 2–5.

¹⁵⁹ On this measure see the fundamental contributions by Plaumann 1913, Mendner 1966, Rödl 1968, von Ungern-Sternberg 1970, 2008, Duplá 1990b, and Nippel 1995: 58–63. On the formula '*videant consules, ne quid res publica detrimenti caperet*' see Cic. *Cat.* 1.2.4 (on the *scu* of 121 BC); Auct. *De vir. Ill.* 73 (*scu* of 100 BC); Iul. Exup. 43Z (*scu* of 83 BC); Sall. *Cat.* 29 and Asc. 6C (*scu* of 63 BC); Cic. *Mil.* 70 and Asc. 34C (*scu* of 52 BC); Caes. *B. Civ.* 1.5, 1.7, Livy *Per.* 109 and Cic. *Fam.* 16.11.2 (*scu* of 49 BC). On the wide variety of rather vague formulas see the collection in Mendner 1966: 258–67. Rödl 1968: 23ff. attempts to reconstruct what he believes to have been the actual decree of the senate.

¹⁶⁰ Caes. *B. Civ.* 1.5; Livy, 3.4.9. Von Ungern-Sternberg 2008 rightly translates *ultimum* as 'the highest'. Agamben 2005: 46, underlining its relation with '*ul*' ('beyond'), interprets the *senatus consultum ultimum* as 'something that lies at the extreme outer edge of the juridical order'. See Vaan 2008: s.v. *uls*.

¹⁶¹ For this interpretation see Guarino 1970, Labruna 1975: 63–4 and 162–3, Crifò 1968: esp. 61ff. and 1984: 123ff and Drummond 1995: 79–113, esp. 81–8. Most recently the most comprehensive study on the topic is Duplá 1990b. *Contra* von Ungern-Sternberg 1970. Mitchell 1971 advocated the idea that the senate formed some sort of supreme deliberative body whilst the magistrates acted as instruments of its policies.

¹⁶² Cf. Ulp. *Reg.* 46 and *Dig.* 50.17.54: *nemo plus iuris ad alium transferre potest, quam ipse haberet*. See Crifò 1968: esp. 61ff.

interrex, the senate could not invest the magistrates with any power, nor take the *auspicia*. Even when, under exceptional circumstances, the senate decided to abolish usual magistracies and resort to a dictator, it had to rely on a consul, who alone had the power to accept or reject the senate's authoritative advice.

This advice of the senate came to have a fundamental political meaning in the conflicts of the late Republic. Void of any strictly legal force, it represented a 'vote of trust', a manifestation of strong political backing that the senate gave certain magistrates, who could therefore feel fully supported in any action they should decide to take in handling what they (and their supporters) perceived as an emergency situation.¹⁶³

It was used against those who could be plausibly described as destabilising the *status quo*, from Gaius Gracchus to Catiline, that is, against politicians often in the sources described as *populares*, and was based on the senate as the political focus of the *res publica*. It follows that in scholarship the '*senatus consultum ultimum*' can be presented as a senatorial practice that was perennially contested by the *populares*.¹⁶⁴ However, this statement should not obscure the fact that Roman politicians could change sides with considerable ease, moving from violent opposition to the measure to endorsing it and fully defending its enactor. As in the case of the *potestates extraordinariae*, it is important to underline that, adopting the ideological weaponry provided by the relevant intellectual tradition, each politician supported the cause that, for whatever reason, was deemed most appropriate for the occasion. Thus, for example, at the end of 63 BC Metellus Nepos violently denounced Cicero, who had had the Catilinarians killed without trial under the alleged aegis of the '*senatus consultum ultimum*', but was in reality attacking the whole senate 'on the ground that they had no right to condemn any citizen to death without consent of the people'.¹⁶⁵ On this basis, he also 'declared that a man who had punished others without a trial (*indicta causa*) ought not himself to be granted the privilege of making a speech',¹⁶⁶ and permitted Cicero to take merely the customary oath on his laying down the office. However, in 57 BC during the debate concerning the law which allowed for Cicero's return from exile, Nepos, with a considerable modification of his previous position, deserted Clodius and claimed that the law on his recall should be promulgated, since Cicero had acted in defence of the country. It was the safety of the commonwealth, he argued, that had been at stake and in defence of which

¹⁶³ Duplá 1990a: 75–80.

¹⁶⁴ See, for example, Meier 1965 and Duplá 1990a: 79, 2011: 295.

¹⁶⁵ Dio Cass. 37.42.

¹⁶⁶ Cic. *Fam.* 5.2.8.

Cicero had acted, and the senate reinforced this point by declaring that anyone who attempted to block this legislation would be declared a public enemy.¹⁶⁷

Presented in political, rather than juridical, terms, the question at the centre of the debate was the role of leadership which, in case of perceived emergency, the senate claimed unilaterally at the expense of the popular assembly. Two main issues were contested: first, the right reserved by the senate alone to judge the gravity of the peril facing the commonwealth, and the consequent informal declaration of a 'state of emergency';¹⁶⁸ second, the political support that with its decree the senate offered magistrates, who might disregard the law by adopting any measure they deemed necessary to overcome the immediate threat. In practice, this meant overriding the citizens' right to trial on a capital charge before a properly constituted court. This right, which was enshrined in a set of laws (in particular the *lex Sempronia de capite civis*) and conceived as expression of the will of the people, embodied the principle that no one in the civic community could decide over the life or death of its members except the community itself, which the court ideologically represented.¹⁶⁹

Late Republican rhetorical treatises attest that these were the lines along which the arguments in favour of and against the '*senatus consultum ultimum*' were debated and, importantly, were expected to be debated. Since these rhetorical texts also fulfilled the function of a practical guide to oratory, the arguments deployed in the debate between Lucius Opimius, who had killed Gaius Gracchus under the aegis of the '*senatus consultum ultimum*', and Quintus Decius, who opposed the legality of Opimius' action, would have certainly resonated amongst contemporary practitioners of oratory, who must not only have found them plausible and appropriate, but must also have duplicated them if the necessity arose.¹⁷⁰ Discussing the techniques proper to a defence speech, Antonius in Cicero's *de oratore*

¹⁶⁷ On Nepos see Cic. *Red. sen.* 25 f., 31, *Dom.* 30, *Sest.* 129f., *Mil.* 39, *Pis.* 34ff. On the senate's decree see Cic. *Red. sen.* 27, *Sest.* 129, *Pis.* 35. In correspondence with me Pedro López Barja de Quiroga attributes Nepos' change of attitude to his consolidated position as consul, as opposed to 63 BC when Nepos held the tribunate of the plebs. Taylor 1949: 125 regards Nepos as an agent of Pompey, whose position in relation to the Clodius–Cicero affair had been modified.

¹⁶⁸ For a review of the modern formulations applied to describe this state of affairs in Rome see Duplá 1990b: 34–7.

¹⁶⁹ On the issue at stake in the struggle over the '*senatus consultum ultimum*' see Lintott 1968, 172–3, Drummond 1995: 106 and Nippel 1995: 66. Duplá, 1990b, 182–94 develops Finley's idea (1983: 3–6) of defence of class interests. Vicenti 1984 claims that the *populares* did not contest the legitimacy of the '*senatus consultum ultimum*' in abstract terms, but rather the senate's arbitrary authority in establishing the existence of a situation of emergency. See also Chapter 2.

¹⁷⁰ On the use of rhetorical treatises as a guide to practised oratory see Arena (forthcoming).

emphasises the importance of identifying the nature of the issue at stake by referring to the case of the ‘*senatus consultum ultimum*’ against Gaius Gracchus. ‘Opimius killed Gracchus. What is the substance of the case?’ asks Antonius, ‘That he did so in the interest of the community, after proclaiming a state of war in obedience to the senate’s decree. Strike out this plea, and there will be no case. Decius, however,’ Antonius continues, ‘denies the legality of the decree itself as being contrary to laws. So the issue will be whether the senate’s decree and the salvation of the community justified the act.’¹⁷¹ The paradigmatic value of this example is further attested by its recurrence in Cicero’s *Partitiones Oratoriae*. Imparting rhetorical advice to his son, Cicero claims that ‘the discussions arising in these disputes that involve definite persons and occasions are turned into unlimited discussions when the persons and occasions are removed and fall back into the form and method of debates’. He continues by adopting the example of the discussion between Opimius and Decius: ‘Opimius: “I acted rightly, for the sake of the general safety and the preservation of the state”, and Decius’ rejoinder: “You had no power or right of any kind to kill even the most criminal citizen without trial”, the discussion that arises is whether he had the power and the right for the sake of the safety of the state to put to death a citizen who was a violent revolutionary without his having been found guilty.’¹⁷²

In the course of the late Republic, each time the ‘*senatus consultum ultimum*’ was passed it inevitably polarised the political scene between those who supported it as the most appropriate and efficacious method to deal with an emergency situation and those who deemed it essential to defer to the existing legal framework.

Perhaps proposed but not implemented in 133 BC against Tiberius Gracchus,¹⁷³ it was certainly first adopted in 121 BC against Gaius Gracchus and his followers.¹⁷⁴ It was then passed again in 100 BC against the tribune of the plebs L. Appuleius Saturninus,¹⁷⁵ in 88 BC against the tribune Sulpicius, opponent of Sulla,¹⁷⁶ in 83 BC against the proconsul Sulla (although the case is not at all clear)¹⁷⁷ and in 77 BC against the proconsul Lepidus.¹⁷⁸

During the period under consideration here, the issue assumed a new prominence at the beginning of 63 BC, when Rabirius was put on trial for

¹⁷¹ Cic. *De or.* 2.132.

¹⁷² Cic. *Part. Or.* 106. According to Nippel 1995: 65, these debates centred on the question whether Gracchus could rightly be considered a would-be tyrant.

¹⁷³ An accurate treatment of this issue can be found in Rödl 1968: 105ff.

¹⁷⁴ Cic. *Phil.* 8.14.

¹⁷⁵ Cic. *Rab. perd.* 20.

¹⁷⁶ Plut. *Sull.* 8.

¹⁷⁷ Iul. Exup. 43–4Z, *contra* App. *B. Civ.* 1.86.

¹⁷⁸ Sall. *Hist.* 1.77Mc.

the killing of Saturninus which had taken place thirty-seven years earlier. It was further reinvigorated towards the end of the same year by its use against those involved in the Catilinarian conspiracy. The year after, in 62 BC, it was passed against the tribune Metellus Nepos,¹⁷⁹ and in 58 BC it once again played a considerable role in the political debate of the time, in light of Clodius' accusation against Cicero and the latter's consequent exile. It was proclaimed again in 52 BC, after the murder of Clodius, as a consequence of public disorder, and eventually led to the proclamation of Pompey *consul sine collega*.¹⁸⁰

In the political debates concerning this issue, those who opposed the measure claimed to be acting in defence of the laws and the citizens' right to *provocatio* against the whim of the magistrates. On the other hand, those who spoke in its support never employed the argument of the senate's higher prerogative to deal with a crisis nor, conversely, the idea of the people's incompetence in dealing with an emergency situation. Rather, they professed that the recourse to the '*senatus consultum ultimum*' and the related actions of the magistrates in charge were the only efficacious available means to preserve the liberty of the commonwealth.

In 63 BC, the case against Rabirius, an old and frail man accused by the tribune Labienus of having murdered the tribune of the plebs Saturninus thirty-seven years earlier under the banner of a '*senatus consultum ultimum*', was, in the eyes of everybody, an attack on the *auctoritas* of the senate rather than on the person of Rabirius himself.¹⁸¹ As Cicero attests in his speech for the defence, later echoed in the *in Pisonem*, those who brought Rabirius to trial did not truly wish to attack an old, infirm and friendless man.¹⁸² Theirs, Cicero claims, was an attempt to deprive the commonwealth of the chief support of Roman imperial dignity (*summum auxilium maiestatis*

¹⁷⁹ Dio Cass. 37.43.

¹⁸⁰ Asc. 51–2C; Cic. *Mil.* 23.61, 26.70. Outside the chronological limits of this work, the '*senatus consultum ultimum*' was also proclaimed against Caesar in 49 BC (Caes. *B. Civ.* 1.5.3, 1.7.5); in 48 BC against M. Caelius Rufus (Dio Cass. 42.23), in 47 BC against the tribune Dolabella (Dio Cass. 42.29–33), and twice in 43 BC, first against M. Antonius, then against Octavian (Cic. *Phil.* 8.6; Dio Cass. 46.29, 46.44, cf. 46.47–8). For its passage in 40 BC Dio Cass. 48.33.3. Livy also reports its declaration in two legendary episodes which allegedly took place in 464 BC (3.4.9) and 384 BC (6.19). For full treatments of all cases see O'Brien Moore 1935: col. 757ff. and Rödl 1968: 9ff.

¹⁸¹ On the rhetorical facets of Cicero's *pro Rabirio perduellionis* see Cape 2002, Lintott 2008: 120–5 and some very interesting remarks in Tyrell 1978. Primmer 1985: 28–9, who focuses mainly on the historical context and Cicero's manipulation of events, interprets *auctoritas senatus* in the technical and concrete sense of 'decree' in reference to the '*senatus consultum ultimum*' of 100 BC.

¹⁸² Cic. *Pis.* 4. Cf. Dio Cass. (37.26.1–3), perhaps dependent on Cicero here. Cf. Cic. *Orat.* 102 on the composition of the *pro Rabirio perduellionis*, which in defending a matter of great importance required a great deal of amplification (*omni genere amplificationis exarsimus*). On the importance of the speech for Cicero's own career see Cape 2002: 130.

atque imperi), to render the authority of the senate and the power of the consuls void, and the concerted action of all good citizens unable to fight against the pests of the commonwealth.¹⁸³ The acquittal of Rabirius, Cicero argues, would be tantamount to holding supreme the *summum imperium* of the consuls and the *summum consilium* of the senate.¹⁸⁴

The line of defence which Cicero uses in support of the '*senatus consultum ultimum*' claims that this measure is the only efficacious means to guarantee the liberty of the commonwealth from the domination of an enemy. 'What shall we say,' Cicero asks, 'of the Roman knights, most honourable men and best of citizens, who on that occasion combined with the senate in defence of the Republic; or of the *tribuni aerarii* and the men of all other classes who on that occasion took up arms to defend the common liberty?'¹⁸⁵ The safety of the commonwealth is intrinsically bound to its liberty and, in the opinion of Cicero and those who support the recourse to the '*senatus consultum ultimum*', the words 'let those who desire the safety of the Republic . . . ' stand for 'the commonwealth's hopes of liberty, of safety, and of honour'.¹⁸⁶

Even in the improbable case that under pressing circumstances Cicero might have altered the written version of this speech (sent to Atticus in 60 BC) to fit the Catilinarian events of few months later,¹⁸⁷ it is plausible to assume that the ideas of *salus rei publicae* and *libertas communis* adopted there were what the contemporary audience and readership expected to see deployed in the advocacy of the '*senatus consultum ultimum*'.¹⁸⁸ As Cicero argues in the *pro Rabirio perduellionis*, the '*senatus consultum ultimum*' of 100 BC aimed at preserving the *salus communis* and the imperial majesty of the Roman people.¹⁸⁹ All men who desired the safety of the commonwealth took up arms against the enemy, since 'they held that their own well-being was bound up with the well-being of the Republic'.¹⁹⁰ In defence of individual as well as common interests, which coincided with one another, the '*senatus consultum ultimum*' ensured the safety of the commonwealth.

The concerted action of the senate and the magistrates, coordinating all the good citizens against 'the audacity of wicked men', constitutes 'the

¹⁸³ Cic. *Rab. perd.* 2. ¹⁸⁴ Cic. *Rab. perd.* 3.

¹⁸⁵ Cic. *Rab. perd.* 27, cf. 22. ¹⁸⁶ Cic. *Rab. perd.* 34.

¹⁸⁷ Cic. *Att.* 2.1.3. See, most recently, Lintott 2008: 136–7. For a very good account of the whole issue see Cape 2002: 114. See also McDermott 1972. More in general on the publication of Cicero's speeches see Introduction: 2–3.

¹⁸⁸ On the popular perspective on this issue, fully centred on the citizens' right of *provocatio*, see Morstein-Marx 2004: 109.

¹⁸⁹ A theme that consistently recurs in Cicero's speech; see, for example, *Rab. perd.* 20, 21, 22, 30, 34. See Burckhardt 1988: 120 with n.114.

¹⁹⁰ Cic. *Rab. perd.* 20.

commonwealth's refuge in emergencies and the security of its welfare'.¹⁹¹ This safety, Cicero argues, is endangered by the likes of Saturninus, not only a nefarious man, but more importantly one who could be plausibly described as a *hostis populi Romani*, a public enemy against whom it is necessary to take up arms to preserve the *libera res publica*. If Marius, Cicero argues, the great *pater patriae* and father of Roman *libertas*, ended up taking up arms against Saturninus under the '*senatus consultum ultimum*', it follows that Rabirius, who proceeded under Marius' leadership, acted in defence of liberty.¹⁹² Ultimately, the cause of Marius and Rabirius was one and the same, and, as Cicero goes to considerable length to explain, it was a cause of liberty.¹⁹³

However, not only could Cicero claim that the '*senatus consultum ultimum*' was a means to preserve *libertas communis*, but he could also, with a very interesting rhetorical twist, argue that the true enemy of Roman *libertas* was indeed Labienus. By virtue of the procedure employed by Labienus to indict Rabirius, Cicero could present his adversary as violating the citizen's right to *provocatio*.¹⁹⁴ Although the exact nature of the trial is controversial, it seems most likely that the tribune Labienus, whose uncle had been killed under the same circumstances as Saturninus, instituted (through a plebiscite) a very archaic and obsolete form of trial by appointing a board of two to try any case of *perduellio* that may result from their findings.¹⁹⁵ The senate was able only to secure that the penalty of exile should be substituted for the statutory one of crucifixion, a cruel punishment to which the shameful stigma of slavery was also attached. The board was composed by two officials, Julius Caesar and his uncle Lucius, selected by the urban praetor precisely to condemn Rabirius to death without his having the right to defend himself or his sentence voted on by the people. Although Rabirius' appeal brought to an end the activities of the *duoviri*,¹⁹⁶ which were then replaced by a prosecution before the assembly,¹⁹⁷ the initial

¹⁹¹ Cic. *Rab. perd.* 4. ¹⁹² Cic. *Rab. perd.* 27–8.

¹⁹³ Hence Cicero could present himself as the true *popularis* consul in opposition to Labienus. See Cape 2002, Morstein-Marx 2004: 227, Lintott 2008: 120–5 and Duplá 2011. On Cicero's use of the term *popularis* see below 231 n.340. Nippel 1988a: 84 and 105 underlines that contrary to Cicero's line Rabirius' action had taken place in open defiance of Marius' proclamation of *fides publica*.

¹⁹⁴ Cic. *Rab. perd.* 10–17.

¹⁹⁵ For the list of those crimes that were classified under the umbrella of *perduellio* see Brecht 1938.

¹⁹⁶ Cic. *Rab. perd.* 10–13, 15–16; Suet. *Jul.* 12; Dio Cass. 37.27.2. On the nature of the trial see Lintott 1972: 261–2, 1999: 152–3 and 2008: 120 and Phillips 1974.

¹⁹⁷ Cic. *Rab. perd.* 7–8. Tyrell 1978 (cf. also Tyrell 1973) establishes that Cicero's speech was delivered before a centuriate assembly (not tribal) in a capital trial. See also Alexander 1990: n.221. In this second proceeding, the accusation of treason was combined with a wide number of charges of a

recourse to the *duoviri* allowed Cicero to present Labienus as violating the citizen's right to *provocatio* and thereby as the true enemy of *libertas*. 'What a friend of the people,' Cicero thunders 'is our tribune, what a guardian and defender of its rights and liberties! The law of Porcius forbade the rod to be used on the person of any citizen: this merciful man has reintroduced the scourge. The law of Porcius wrested the liberty of the citizens from the lictor: Labienus, the friend of the people, has handed it over to the executioner.'¹⁹⁸ Cicero continues by stating that the *lex Sempronia de capite civis*, disregarded by the tribune of the plebs Labienus, forbade a sentence to be passed on the life of a Roman citizen without the consent of the people. However, this 'friend of the people' had illegally secured, without the consent of the people, that the *duoviri* should condemn a Roman citizen to death without his case even being heard.¹⁹⁹ 'Do you really dare to talk to me of the law of Porcius or of Gaius Gracchus or of any other friend of the people, after having attempted, not merely by the use of unwonted punishments but by the unparalleled cruelty of your language, to violate the liberty of this people?'²⁰⁰

By claiming that Labienus had trampled on all Roman laws, deliberately infringing upon Roman *libertas*, Cicero could avert the accusation of violating the right to *provocatio* from his client and his associates, who had acted with him in response to the '*senatus consultum ultimum*', and present them as the true defenders of the *res publica* and *communis libertas*.²⁰¹

The recourse to the '*senatus consultum ultimum*' was one of the most efficacious means of dealing with those evil citizens (*perditi cives*) personified by Saturninus and his associates as well as Catiline and his followers. In pleading his cause against the Catilinarians before the senate, Cicero claims that they could never be coerced by force nor won over by kindness, but ought to be defeated if the senators wished to maintain the safety and the liberty of the *res publica*.²⁰² Since there is not a single senator, Cicero argues, for whom the sight of the city and the possession of liberty are not precious and a true delight,²⁰³ they should deliberate bearing in mind that what is at stake is the salvation of the whole commonwealth, their very wives and children, the buildings and homes of the entire city,

non-capital nature (from violations of sacred precincts and groves to embezzlement and the murder of his nephew).

¹⁹⁸ Cic. *Rab. perd.* 12. ¹⁹⁹ Cic. *Rab. perd.* 12.

²⁰⁰ Cic. *Rab. perd.* 13. ²⁰¹ Cic. *Rab. perd.* 21–2.

²⁰² Cic. *Cat.* 4.22. On the issues concerning the use of the two main sources to reconstruct the debate on the fate of the Catilinarians (Cicero's Catilinarian orations and Sallust's *de Catilinae Coniuratione*) see Introduction: 2–5.

²⁰³ Cic. *Cat.* 4.16; cf. *Cat.* 1.8.

and the dominion and the liberty of the *res publica*.²⁰⁴ The whole mass of freeborn citizens, even the poorest, Cicero states emphatically, are now united in the fight to defend their fatherland 'by their private fortunes, their community of political interest and by that sweetest of all possessions – liberty (*communis res publica, quos denique libertas ea quae dulcissima est ad salutem patriae defendendam excitavit*)'.²⁰⁵ In making their decision on the fate of the Catilinarians, Cicero exhorts the senators to 'think how one night nearly destroyed all the toil that founded our empire, all the valour that established our freedom (*quanta virtute stabilitam libertatem*), all the bounty of the gods that has built up our fortunes to their present size'.²⁰⁶

During the senatorial debate reported by Sallust, Decimus Silanus, the *consul designatus*, proposed that 'those who have attempted to destroy Rome should be punished by death'.²⁰⁷ According to Silanus, in Cicero's summary of his position, those who wished 'to destroy the empire and erase the name of the Roman people ought not to enjoy life' nor breathe the same air that they attempted to annihilate. This kind of punishment, Silanus claimed, had always been adopted against *improbi cives* who had tried to overthrow the whole senate and people of Rome.²⁰⁸ The other consul-elect, as well as fourteen *consulares*, agreed with him. However, in Sallust's reconstruction of the debate, Caesar, praetor-elect at the time, tried to modify the emphasis of the discussion by claiming that the senators were called to decide upon the best form of punishment. Following the example of the *maiores*, who overcame the dictates of passions and acted justly towards Rhodes, the senators' punishment should be consistent with their dignity.²⁰⁹ The issue at stake, Caesar claimed, was the identification of the punishment most appropriate to the senators' *dignitas* and *nomen*, as well as to the seriousness of the crime perpetrated. In his opinion, the death penalty should be avoided, but the full rigour of the law should still be applied.²¹⁰

In response to this argument, which succeeded in swaying some senators, Sallust's Cato stated that the whole debate was simply articulated on the wrong assumptions. He claimed that the issue at stake was not what punishment should be issued against the conspirators, but rather what measures should be adopted in order to preserve the safety of the commonwealth: 'The situation,' he says, 'warns us rather to take precautions against them than to argue about what we are to do with them.'²¹¹ According to Cato, what his fellow senators do not seem to understand is that they are

²⁰⁴ Cic. *Cat.* 4.24; cf. Cic. *Att.* 1.14.3.

²⁰⁵ Cic. *Cat.* 4.16.

²⁰⁶ Cic. *Cat.* 4.19.

²⁰⁷ Cic. *Cat.* 4.7.

²⁰⁸ *Ibid.*

²⁰⁹ Sall. *Cat.* 51.5–6.

²¹⁰ Sall. *Cat.* 52.6–8.

²¹¹ Sall. *Cat.* 52.3.

at war and that the existence of the state itself is at risk: 'The question before us is . . . whether all that we have, however we regard it, is to be ours, or with ourselves is to belong to the enemy.'²¹² When the issue is the commonwealth's existence, no one should spend his time discussing the lawfulness of a certain course of action, because 'in vain you will appeal to the laws' once the commonwealth itself has been destroyed. As Cato says, 'once a city has been taken, nothing is left to the vanquished'.²¹³ We are at war, he repeats, 'here is no question of revenues or the wrongs of our allies; our lives and liberties are at stake (*libertas et anima nostra in dubio est*)'.²¹⁴

In Rome, in Cato's opinion (or at least in the opinion attributed to him by Sallust), there is no longer room for *virtus*, senators cultivate only their own private interests and have been subjected to their own emotions, enslaved to pleasures in private and to money and power in public: as a result, the *res publica* has been left defenceless and open to attacks from Catiline and his followers.²¹⁵ The situation is particularly worrying as the enemy is within the walls and the senators do not seem to have realised the danger they are about to incur. 'Catiline with his army is at our throats; other foes are within our walls in the very heart of Rome.'²¹⁶ Hence, he recommends that those who have confessed to plotting great crimes against their fellow citizens and their country ought to be treated as though they had been caught red-handed in a capital offence and be sentenced to capital punishment, without the possibility of going into exile.²¹⁷ Their execution, his argument runs, is necessary to preserve the safety and the liberty of the commonwealth. Cato's stance was so strongly perceived to be in defence of *libertas* that even at the end of Cicero's office, when Metellus Nepos prevented him from delivering his end of year speech, those who supported the '*senatus consultum ultimum*' urged each other to keep up their opposition and 'and not to betray their liberty and the man [Cato] who was striving to defend it'.²¹⁸

In 61 BC before the senate Crassus highly praised Cicero's consulship in the most encomiastic terms, as Cicero himself reports in a letter to Atticus. He went so far as to say that 'it was to me [Cicero] he owed his status as a senator and a citizen, his freedom, and his very life (*se quod esset senator, quod civis, quod liber, quod viveret, mihi acceptum referre*). Whenever he saw his wife or his house or the city of his birth, he saw a gift of mine. In short he worked up the whole theme which I am in the habit of embroidering in my speeches one way or another, all about fire, sword, etc. (you are their

²¹² Sall. *Cat.* 52.10.

²¹³ Sall. *Cat.* 52.4.

²¹⁴ Sall. *Cat.* 52.6.

²¹⁵ Sall. *Cat.* 52.21–3.

²¹⁶ Sall. *Cat.* 52.35.

²¹⁷ On this point see Nippel 1995: 68–9.

²¹⁸ Plut. *Cato min.* 27.6.

Aristarchus and know my colour box) most impressively.²¹⁹ For those who supported it, the fight against the Catilinarians with its related recourse to the '*senatus consultum ultimum*' had become almost a rhetorical *topos* of the struggle for liberty.

In rhetorical debates, the association between the defence of the '*senatus consultum ultimum*' and the preservation of liberty appeared to be so successfully plausible in the eyes of its supporters that it could still be adopted to campaign for Cicero's return from exile, and deployed to strengthen his position. Although he had been indicted for having sentenced the Catilinarians to death without trial (that is, for having violated the right to *provocatio*), allegedly under the aegis of the '*senatus consultum ultimum*',²²⁰ in early May of 57 BC, the senate could still decree a gathering in Rome of support for Cicero on the motion of Lentulus Spinther, by calling upon all citizens who treasured the safety and the liberty of the commonwealth.²²¹

On the same day, at the *Ludi Florales*, the news of the senate's decision on Cicero was announced at a theatrical performance.²²² The senators, Cicero reports, were cheered with joy, and the entrance of Lentulus Spinther to the theatre almost brought the house down. Clodius, instead, was jeered and barely escaped lynching by the people. A line of Afranius' work the *Simulans* on the pretended madness of Brutus, the liberator of Rome from the tyrant Tarquinius Superbus, was given particular emphasis by the actors, who, speaking in most splendid concert and looking towards the face of Clodius, repeatedly said 'this is the sequel, the end of your wicked life'.²²³ As Cicero comments, during the games there had not been a sentence or an apophthegm in the play with some bearing on contemporary events which either escaped the notice of the audience or on which the actor had not laid particular emphasis.²²⁴ 'Who, in a critical state of affairs, did not hesitate to expose his life, did not spare his own person or privileges,' recited the actor with such vigour as to raise numerous shouts from the audience and to which he added 'a most excellent friend, in a most important war,' referring to Cicero and to the war that guaranteed the safety and the liberty of the commonwealth.²²⁵

²¹⁹ Cic. *Att.* 1.14.3.

²²⁰ The precise nature of the accusation against Cicero is unclear: at Cic. *Dom.* 50 Cicero is accused of having forged a '*senatus consultum ultimum*' (*quod M. Tullius falsum senatus consultum retulerit*); however, this could be an alteration of the true accusation against him that concerns the manipulation of the records concerning the interrogation of the informants (Cic. *Sull.* 40–4). For an analysis of the Clodian law on Cicero's exile see Moreau 1987: 465–92.

²²¹ Cic. *Red. sen.* 24, *Dom.* 73, 85, *Planc.* 78, *Sest.* 50, 116, 120, 128, *Pis.* 34.

²²² Cic. *Sest.* 116–23. Cf. *Planc.* 78; Schol. Bob. 136, 166 St. ²²³ Cic. *Sest.* 118.

²²⁴ Cic. *Sest.* 118. See also Kaster 2006: *ad loc.* ²²⁵ Cic. *Sest.* 120–1.

Although the biased nature of this audience (gathered together by Pompey and others in support of Cicero's return) as well as the partisan character of Cicero's account in the *pro Sestio* have long been recognised,²²⁶ its attestations show how in 56 BC Cicero's actions, probably under the aegis of the '*senatus consultum ultimum*', could still be plausibly represented (and, albeit in a manipulated form, received) as in defence of liberty.

Albeit in reality a reference to the king Servius Tullius, the audience took another association suggested by the actor's emphasis as a reference to Cicero and his actions for liberty. The phrase became almost a slogan and Cicero was hailed as a liberator and saviour of the country. 'In the "Brutus", I was mentioned by name: "Tullius, who had established the liberty of the citizens."' It was encored again and again. Did the Roman people appear to be giving slight indications that it had been established by me and by the senate, though profligate citizens accused us as having destroyed it?'²²⁷

The killing of the Catilinarians without trial, in fact, could be easily represented as an action against liberty, and Clodius had done his best to make this message as clear and as widely accessible as possible. Alongside accusations of tyrannical cruelty, monarchical aspiration, and even pretension to divinity against Cicero, he built a shrine to the goddess Libertas on the site of his house.²²⁸ In line with the punishment traditionally reserved for would-be tyrants, upon his legal banishment Cicero's properties were confiscated and sold at auction and his house on the Palatine demolished.²²⁹ According to tradition, the three famous aspiring tyrants of the fifth century had experienced a very similar destiny. The house of Spurius Cassius, accused of having plotted to seize monarchical power, was razed to the ground; Spurius Maelius, charged with an analogous accusation, was killed by the tyrannicide Servilius Ahala and his *domus* replaced by the *Aequimaelium*; and the house of Manlius Capitolinus, thrown from the Tarpeian Rock in 384 BC for having aspired to tyranny, was replaced by a temple to Juno Moneta.²³⁰

Although the actual form of the shrine is hardly recoverable, it seems certain that the complex comprised a long paved portico with a peristyle, and an actual shrine where presumably the cult statue of the goddess, a piece

²²⁶ According to Vanderbroeck 1987: 77ff. the audiences always displayed an anti-*popularis* bias.

²²⁷ Cic. *Sest.* 123.

²²⁸ On Clodius' accusation against Cicero see Cic. *Att.* 1.16.10, *Fam.* 7.24.1, *Dom.* 7, 75, *Sull.* 21, *Planc.* 75, *Har. resp.* 17, *Sest.* 109, *Vat.* 23, *Mil.* 12; Ps.-Sall. *Inv. Cic.* 6, 7. On Cicero as *hostis* see Cic. *Dom.* 7. On his divine pretence see Cic. *Dom.* 92. See Weinstock 1971: 302ff.

²²⁹ Nippel 1988a: 116–17.

²³⁰ See Smith 2006: 49–52 on Cassius, 52–4 on Maelius, and 54–5 on Manlius.

imported from Tanagra – and, according to Cicero, a stolen statue from a prostitute's tomb – was housed.²³¹ Very revealingly, the complex boasted an honorific statue of Clodius, erected by one of his clients, a certain Mennulla of Anagnia, and an inscription that displayed the tribune's name on the lengthy facade overlooking the forum. Thus, the new portico, inscribed with Clodius' name, faced into the most frequented district of the city,²³² and for the people who looked into the peristyle it was possible to see not only a statue of Libertas but also an image of Clodius himself.

Placed on the Palatine 'in sight of practically the whole city',²³³ most probably on the northern slope of the hill (one of the most fashionable neighbourhoods of the time),²³⁴ the new complex, which was also somehow connected to Clodius' own house, was a celebration of Libertas and of Clodius himself, now the new liberator.²³⁵ The Roman *domus* was not merely a residence for the Roman aristocrat. Combining both profane and sacred space, it also represented his personal status and his public image. Not only did the *domus* act as the pivotal centre of the aristocrat's political activity, but also as a symbol of his political power.²³⁶ The view of the *aedes Libertatis* somehow connected to Clodius' house must have created a powerful effect on those who could appreciate the spectacle from the forum.

This monument to Libertas accrued further symbolic capital, as Cicero himself did not fail to notice, from its association with the architectural structures previously in place there, some of which (such as the *porticus Catuli*) had been probably also integrated into the shrine.²³⁷

²³¹ Cic. *Dom.* 111. For an interpretation of this statue see Achard 1981: 319. On the architecture of this monument see, most recently, *LTUR*: s.v. *Libertas* (1), III 188–9; *ibid.*, s.v. *Porticus (Monumentum) Catuli*, IV 119. For Maiuri 1946: 310 it was shaped as a rectangular quadriportico and for Tamm 1963: 40 'a promenoir, a portico, that will at the same time be a monument, of the type erected after victory'. Picard 1965, followed by Royo 1987, reaches the most convincing conclusion that Clodius' construction was a peristyle containing a round shrine housing the statue of Liberty. He supposed that it looked like the colonnaded precincts depicted in second-style wall paintings such as that of the Boscoreale mausoleum.

²³² Cic. *Dom.* 146.

²³³ Cic. *Dom.* 100. Cf. Livius Drusus' wish to be seen by the public (Cicero's house seemed to be built upon the ruins of Livius Drusus' house): Vell. Pat. 2.14.3.

²³⁴ Tamm 1963: 34. For a location right on the top of the Palatine see *LTUR*: s.v. *Domus M. Tulli Ciceronis*(1), II 202–10. *Contra* Allen 1944 places Cicero's house at the beginning of the *Clivus Palatinus*, between the *Via Nova* and the *Clivus Victoriae*. Carandini 1988: 360 (cf. also 1990), locates it at the very foot of the Palatine, close to the Forum, and Royo 1987 in the so-called *Forum adiectum*.

²³⁵ On the vicinity of Cicero's house to Clodius' see Tamm 1963: 29ff., Carandini 1986: 266ff. and Royo 1987: 107.

²³⁶ Schneider 1974: 178ff., Wallace-Hadrill 1988 and 1994: 4–16 and Treggiari 1998. Most illuminating on Clodius' affairs is Tatum 1999: 159–66.

²³⁷ Cic. *Dom.* 102, 114.

The new complex to Libertas was built on a site that partially included whatever was left of the house of Fulvius Flaccus. Consul in 125 BC and a strong advocate of the Gracchan reforms, Fulvius Flaccus had been murdered without trial in 121 BC after the promulgation of the first '*senatus consultum ultimum*'. His house, to which the same destiny as that of the other would-be-tyrants' houses was reserved, was demolished and on its site the *porticus Catuli* was erected.²³⁸

The latter was a manubial portico that the elder Catulus, consul in 102 BC and *triumphator* over the Cimbri in the same year, had built, devoting part of his booty to this public building.²³⁹ For Cicero, however, the monument also embodied the younger Catulus, the man who not only supported him in his clash with Clodius at the *Bona Dea* trial, but also had expressed a favourable opinion on the execution of the Catilinarians, and whom in 77 BC the senate had charged him with seeing that the *res publica* met no harm at the hands of Lepidus.²⁴⁰ The proximity of this monument was so important for Cicero and his brother Quintus that they appear to have developed almost a sense of personal attachment to it. In a letter of 54 BC to Lentulus Cicero referred to it as 'my monument',²⁴¹ while Quintus, writing from Gaul in the same year, inquired about its condition.²⁴² Important to Cicero on a personal level, the *porticus Catuli* also held considerable symbolic value for the cause that Cicero represented.

If, on the one hand, by building the shrine to Libertas Clodius could symbolically vindicate the Catilinarians and rehabilitate Fulvius Flaccus, on the other, by rebuilding his house as well as the *porticus Catuli* upon his return, Cicero could reaffirm the justice of his actions.²⁴³ Signalling that the political climate had changed, the restoration of Cicero's house and of the *porticus* of Catulus marked a political victory for Cicero and the other supporters of the '*senatus consultum ultimum*'.

After his return from exile, Cicero further articulated an ideological point at which he had already hinted in 63 BC. Although supported by the '*senatus consultum ultimum*', which, Cicero had claimed, if it had been made public, would have sent Catiline to execution, Cicero had still feared that his actions against the conspirators could have been labelled as unjust.²⁴⁴

²³⁸ Cic. *Dom.* 102. See Bodel 1997: esp. 7–9.

²³⁹ Cic. *Dom.* 102.

²⁴⁰ Cic. *Dom.* 113. On Cicero's reliance on Catulus' support see Cic. *Att.* 1.16.5. For Catulus' role in the fight against Lepidus see Labruna 1975 and Arena 2011b and for his.

²⁴¹ Cic. *Fam.* 1.9.5. ²⁴² Cic. *Q. fr.* 3.1.14.

²⁴³ Cic. *Att.* 4.2.5. Cicero's house brought him criticism even after its reconstruction: Cic. *Att.* 4.5.2. Cf. Ps.-Sall. *Inv. Cic.* 2ff., Cic. *Att.* 1.16.10.

²⁴⁴ Cic. *Cat.* 1.5.

He lamented the loss of that Roman valour that spurred brave men, such as Publius Scipio Nasica and Gaius Servilius Ahala, 'to suppress a citizen traitor with keener punishment than the most bitter foe'. Scipio Nasica, Cicero underlines, was a 'private citizen (*privatus*) when he killed Tiberius Gracchus even though he was not seriously undermining the constitution of the Republic (*statum rei publicae*)', just as in the remote past 'Gaius Servilius Ahala [had] killed Spurius Maelius with his own hand when Maelius was planning revolution (*novis rebus studentem*)'.²⁴⁵ On his return from exile, Cicero dwelled further on this point, advocating the unilateral right of Roman citizens to intervene in defence of the *res publica* and its liberty even regardless the passage of the '*senatus consultum ultimum*'.²⁴⁶

Often referring to the example of Scipio Nasica, who in 133 BC had led the senators as private citizen to kill Tiberius and his followers,²⁴⁷ Cicero claimed that Tiberius had been *iure caesus*, legitimately killed, as 'he had intended to take over the Republic'.²⁴⁸ When the senate convened in the temple of Fides Publica on the Capitol to discuss the situation, against the opinion that there might have not been legal ground to kill Tiberius and his followers (as the refusal to take any action by the presiding consul and expert jurist, P. Mucius Scaevola, suggests), Scipio Nasica is reported to have said that 'by following legal process, the consul is effectively bringing about the collapse of Roman authority and all the laws with it'.²⁴⁹ Arguing a line very similar to that of Sallust's Cato, Scipio Nasica claimed that contrary to a lack of legal grounds for killing Tiberius and his followers, the elimination of an enemy was the necessary means to preserve the commonwealth.

For Cicero Scipio Nasica deserved to be acclaimed as a hero.²⁵⁰ He acted in order to save the *res publica* and its liberty from the domination of Tiberius: 'among all the Romans,' Cicero says to Fufius Calenus in 43 BC, 'He [Calenus' father] used to give the place of honour to Publius Nasica, who killed Tiberius Gracchus, holding that Nasica's courage, judgement,

²⁴⁵ Cic. *Cat.* 1.3. Cf. Antonius' cautious attitude on the issue in Cicero's *de oratore* 2.165–6: 'The right course in a situation affecting the safety of the commonwealth was to obey to the senate, or to set up another advisory body, or to act on his own initiative: to set up another body would have been insolence, to follow his own counsel arrogance; therefore, he should have taken the advice of the senate.'

²⁴⁶ Cicero will later express this principle in the famous law of the *de legibus* (3.8): '*salus populi suprema lex esto*'; see Dyck 2004: *ad loc.* On the whole issue see most recently the stimulating pages in Wiseman 2009: 177–210.

²⁴⁷ On Scipio Nasica committing his action as *privatus* see Cic. *Cat.* 1.3, *Dom.* 91, *Planc.* 88, *Brut.* 212, *Tusc.* 4.51, *Off.* 1.76; Val. Max. 3.2.17.

²⁴⁸ Vell. Pat. 2.4.4. On Tiberius as *iure caesus* see Cic. *De or.* 2.106, *Mil.* 8, *Planc.* 88, *Off.* 2.43.

²⁴⁹ Val. Max. 3.2.17. See Wiseman 2009: 180.

²⁵⁰ Cic. *Dom.* 91, *Mil.* 72, *Off.* 1.109, *Phil.* 8.13; Val. Max. 5.3.2e.

and unselfishness had brought freedom to the commonwealth.²⁵¹ Alongside the behavioural paradigm of Scipio Nasica, the example of Servilius Ahala was often recalled as an illustration of the truly virtuous men's actions in defence of the liberty of the commonwealth.²⁵²

Interestingly, his example recurred in Livy's senatorial discussion on the destiny of the would-be-tyrant M. Manlius Capitolinus, set in 384 BC, which is clearly informed by the principles adopted to discuss this kind of issue at the end of the Republic. During the debate, two main opinions were voiced: on the one hand, the majority of the senators claimed that a 'Servilius Ahala was needed, one who would not exasperate a public enemy by ordering his imprisonment, but would sacrifice a single citizen to end a domestic war'. On the other, the apparently milder, but in force identical proposal was put according to which 'the magistrates should see to it that the Republic took no harm by the ruinous devises of Marcus Manlius'. The latter proposition prevailed, since even the consular tribunes and the tribunes of the plebs, Livy comments, had realised that 'their own authority would have come to an end with the general liberty'.²⁵³

The debate reconstructed, if not invented, by Livy, most probably referred to the oldest tradition on Ahala, where the would-be tyrant is killed by a passionate decision of the senate and the action of a reckless youth, rather than by the order of a properly appointed dictator, as in the subsequent version, altered in response to the Gracchan events.²⁵⁴ Representative of the man of *virtus* who takes the protection of the commonwealth's liberty into his own hands, and kills the enemy in a domestic war, rather than wasting time imprisoning him, in the late Republic Ahala became an ideological symbol of the *privatus* who kills a citizen in the name of the safety of the commonwealth.

As in his attacks against Catilina, so in his defence of Milo, Cicero refers twice to Ahala's actions as a valid precedent for an action carried out in

²⁵¹ Cic. *Phil.* 8.13. See also Cic. *Brut.* 212 with reference to Tiberius Gracchus' domination. Cf. Cic. *Phil.* 8.14–15 where Cicero very revealingly associates the courageous actions of Scipio Nasica against Tiberus with those of Opimius against Gaius Gracchus, of Gaius Marius and Lucius Valerius (consuls in 100 BC) against Saturninus, and of himself against Catiline: 'in the body politic let whatever is noxious be amputated so that the whole may be saved'.

²⁵² See Smith 2006.

²⁵³ Livy 6.19.4. See Oakley 1997: *ad loc.* (476–93) on the political reasons behind the retrojection of contemporary ideas to a remote past. See also Valvo 1983 who gives prominence to the echoes of Marius and Sulpicius in the story of Manlius.

²⁵⁴ For the execution ordered by the dictator see Cic. *Sen.* 56; Livy 4.14.3, 15.1; Dion. Hal. *Ant. Rom.* 12.2.4; by decision of the senate see Cincius Alimentus FGRH 810 F4 and Piso fr. 31 Forsythe = Dion. Hal. *Ant. Rom.* 12.4.2–5. According to Val. Max. (5.3.2) Ahala was later sent into exile, while Livy (4.21.3–4) records only an unsuccessful prosecution. See Lintott 1968: 55–6 and 166–7. On Maelius see also Wiseman 1998: 99–101. Lintott 1970 has a sensible discussion on the manipulation of the story of Ahala.

defence of Roman liberty.²⁵⁵ Whilst during the actual trial of Milo, Cicero apparently tried to persuade the jury that Clodius had been killed in an act of self-defence,²⁵⁶ in the written version of his defence, he advanced a partially different argument. The killing of Clodius, although not premeditated, was, however, a providential tyrannicide. If he had killed Clodius, Cicero claims, Milo would have certainly made it publicly known, as 'for the sake of the liberty of all he had done what called not just for admission but in truth even for public declaration'.²⁵⁷ In 52 BC thus Cicero pushed his argument even further: if before he did not necessarily favour the legal priority of the magistrate's initiative over the actions of a private citizen, but laid a considerable emphasis on the political support of the senate, now he privileged the actions of a private individual, regardless of the passage of the '*senatus consultum ultimum*', if these were carried out in the name of public interest.

Nor was he alone in advocating this line of argument. Cato, one of the jurors at Milo's trial, made it known that he too thought that Milo's act was beneficial to the commonwealth, and many others, sharing his view, added that, if Cicero had adopted it in the actual trial, rather than the defeatist line of self-defence, Milo would have been acquitted.²⁵⁸ Brutus, who two years earlier had issued a coin that featured the goddess Libertas and the tyrannicide Ahala,²⁵⁹ had also argued for the beneficial value of Milo's act, in his own written defence of Milo that he circulated amongst the elite in the form of a court speech.²⁶⁰

In 52 BC, if Coarelli's intriguing hypothesis is correct, in (or very nearby) the temple of Fides Publica a marble copy of a very famous statue-group was set up.²⁶¹ The statue represented Harmodius and Aristogeiton, the two famous tyrannicides who in 514 BC had killed Hipparchus, the brother of Hippias, the tyrant of Athens. They had been placed by the Athenians in the middle of the *agora* to celebrate the liberation of their city and became an emblematic symbol of liberty.²⁶² The choice of the location of this statue-group, close to the temple where Scipio Nasica had exhorted the senators to eliminate the tyrant Tiberius, could be interpreted as a legitimization by way of an illustrious example of such an action carried

²⁵⁵ Cic. *Cat.* 1.3, *Mil.* 72, 83.

²⁵⁶ Asc. 41C; Cic. *Mil.* 6, 23–60. On the natural character of legitimate (?self)-defence see Ferrary 2007: 84–5; on Cicero's overall argument see most recently Narducci 2009: 321–7.

²⁵⁷ Cic. *Mil.* 80. See Cic. *Mil.* 72–91, esp. 79–80 on the issue of liberation.

²⁵⁸ On Cato see Asc. 53–4C; cf. Cic. *Att.* 12.21.1; on the others see Asc. 41C.

²⁵⁹ RRC 433. For Brutus' remembrance of Ahala see also Cic. *Orat.* 153, *Brut.* 331, *Att.* 13.40.1, *Phil.* 2.26; Plut. *Brut.* 1.3; Nep. *Att.* 18.3. For Brutus' admiration for his ancestor and the connection with Ahala and the cause of liberty see Clark 2007: 150–1.

²⁶⁰ Cic. *Att.* 12.21.1; Asc. 41C; Quint. *Inst.* 3.6.93, 10.1.23.

²⁶¹ Coarelli 1969: esp. 149–56 for the dating to 52 BC on the basis mainly of Cic. *Att.* 6.1.17.

²⁶² Parker 1996: 136–7 on the almost cult status of these two heroes.

out by a *privatus* in defence of the *libera res publica*.²⁶³ If the date is correct, it is suggestive, although ultimately speculative, to imagine that the statue-group of Harmodius and Aristogeiton was conceived or at least could be interpreted as a visual response to the shrine of Liberty set up by Clodius on the Palatine, which, however, by then had been destroyed.²⁶⁴ The true defender of Roman liberty was not Clodius, as the shrine to Liberty may have led some to believe, but rather Milo who had freed the commonwealth from the domination of Clodius, in the same way as Harmodius and Aristogeiton had liberated Athens from the domination of Hippias and Scipio Nasica had liberated Rome from the domination of Tiberius Gracchus.

Although, after Cicero's exile, the idea that the would-be tyrant could be justly killed by a *privatus* without even recurring to the '*senatus consultum ultimum*' came progressively to prominence in a certain strand of Roman thought, it remains that all politicians who supported the '*senatus consultum ultimum*' (a measure, it is important to recall, devoid of a strictly legal force) and the related initiatives of Roman magistrates claimed that its proclamation was one of the effective means to preserve the safety of the commonwealth and its liberty. By construing the identity of those against whom the senate's decree was issued as Rome's enemies, they could justify their actions against them as preserving the liberty of the commonwealth from the domination of an external power.

As von Ungern-Sternberg has noted, from 88 BC formal declarations of *hostis* were issued by decision of the senate in cases of perceived danger against adversaries outside the city walls, an expedient devised to deter the transformation of these opponents into heroes and martyrs for the opposite cause. Cicero, the most extensive source on this debate, argued that those who turn against the *res publica* and plan to harm it forfeit by their own will their right to Roman citizenship and its related enjoyment of the right to *provocatio*.²⁶⁵ 'Never in this city,' Cicero claims when discussing Catiline, 'have those who have rebelled against the commonwealth kept the rights of citizens.'²⁶⁶ Catiline and his followers, he argues, are not just *improbi cives*, but actually *acerbissimi hostes*, who had planned 'the massacre of the whole Roman people and the destruction of Rome itself with vicious cruelty'.²⁶⁷

²⁶³ See Plut. *Ti. Gracch.* 19.3 for the appellation of Tiberius as tyrant; Wiseman 2009: 190.

²⁶⁴ Cic. *Mil.* 80 draws a parallel between, on the one hand, Milo's, on the other, Harmodius' and Aristogeiton's actions.

²⁶⁵ On the relation between the declaration of *hostis* and the passage of the '*senatus consultum ultimum*' see von Ungern-Sternberg 1970: 18ff. and 63ff. (a list of the *hostis* declarations: 116, n.153) and 1997: esp. 93ff., Nippel 1984: 27, Duplá 1990b: 155–61 and Kunkell and Wittmann 1995: 238–40; cf. also Jal 1963: 53–79 and Ramelli 2002.

²⁶⁶ Cic. *Cat.* 1. 27, cf. 3.15ff.; *Cat.* 4.10. See also Cic. *Phil.* 8.13. ²⁶⁷ Cic. *Cat.* 4.10, 16.

As such, the fight against them is the fight against the country's enemies for the safety of the *res publica*. It follows, Cicero's argument continues, that the *lex Semproniana*, which guaranteed that Roman citizens could not lose their life without being condemned by fair trial, was not applicable to the Catilinarians, as well as Saturninus or his ilk, since 'an enemy of the Republic could by no means be a citizen'.²⁶⁸ The Catilinarians, in fact, are Roman citizens 'unhinged by an attack of madness (*dementia*)' who had 'become traitors of their own country', and attempted to destroy it. Cicero 'cannot cure these men but, if [his consulship] removes them, then it will have prolonged the life of the Republic, not for a few fleeting seconds, but for many centuries'.²⁶⁹ Subjected to cowardice, folly, and all vices, these Roman citizens have voluntarily renounced their citizenship and now attempt at the destruction of the *libera res publica*.²⁷⁰

By 63 BC, as Cicero argues in his defence of Rabirius, Rome had already conquered the vast majority of the known world and, free from the domination of any external power, lived no longer in fear of an outside enemy. '... no king is left, no country (*natio*), no tribe (*gens*) to cause you fear, there is no evil from outside, of other's causing, that can make its way into our country: if you desire that country to be immortal, if you desire our empire to be eternal and our glory everlasting, it is against our own passions that we must be on our guard, against men of violence and revolutionaries, against evils from within, against plots devised at home.'²⁷¹

The safety of the commonwealth and its liberty were now threatened by internal enemies, Roman citizens who, allowing their passions to take over their *ratio*, had surrendered to the slavery of the self, and, therefore, had become men of violence intent on overturning the *res publica*.²⁷² 'There is no foreign people,' Cicero repeats in his second Catilinarian oration, 'left for us to fear, no king able to make war on the Roman people. Peace reigns abroad by land and sea thanks to the valour of one man. The sole remaining war is on our own soil; the plots, the danger, the enemy are in our own midst. The battles we have to fight are against luxury, folly, and crime.'²⁷³

²⁶⁸ Cic. *Cat.* 4.10. ²⁶⁹ Cic. *Cat.* 2. 11.

²⁷⁰ Cic. *Cat.* 2.19. See Cic. *Caec.* 96–7 where Cicero extensively argues that Roman citizenship could be lost only if rejected by the individual. See discussion in [Chapter 1](#): 28–9. On the recurrent recourse to the language of madness to describe those against whom the '*senatus consultum ultimum*' is issued see [Arena 201rb](#).

²⁷¹ Cic. *Rab. perd.* 33.

²⁷² On the Stoic background to the political language of emotions see [Arena 201rb](#).

²⁷³ Cic. *Cat.* 2.11; cf. *Rab. perd.* 33. For the portrait of Catiline and his followers as affected by *furor* see *Cat.* 1.1, 1.5, 1.22, 2.19, 2.25, 3.16; by vice, *Cat.* 1.13–14.

Those who supported the use of the '*senatus consultum ultimum*' construed their arguments in defence of this measure around a shared notion of *libertas*. By describing as enemies those who, in their opinion, posed a threat to the *res publica*, they appealed to the widely shared principle according to which the *res publica* should not be dominated by any external power, if it wished to preserve its liberty.²⁷⁴ All members of the elite, whatever their personal reasons and their ideological appeals, could not disagree on this point: in order to preserve the liberty of the commonwealth, the *res publica* should remain undominated.

Once again, as in the debate concerning the conferral of the *potestates extraordinariae*, this fact highlights the clever political move operated by those who supported the '*senatus consultum ultimum*'. By claiming with a certain degree of plausibility that the recourse to this measure was one of the most effective means to preserve Roman liberty, they hoped to show that their adversaries had failed to perceive that, in the light of this very value they themselves cherished, their political behaviour could be described as a threat to liberty. Since those who opposed the recourse to the '*senatus consultum ultimum*' and its related actions by Roman magistrates professed to believe that, in order to be free, the *res publica* should not be dominated by an external power, it followed that to oppose the recourse to this measure must have been an act against liberty.

AGRARIAN DISTRIBUTIONS

The third issue that consistently recurred in the political struggle of the first century BC was the demand for land distribution. Each time it arose, it polarised the political climate between those in support of and those against its implementation. Although this is a well-known feature of late Republican history, fully discussed in scholarship, it needs emphasis that those who put up a strong opposition against this measure each time claimed to be acting in the name of liberty. What follows is a reconstruction of these claims.²⁷⁵

All the proposals for land distribution of the period under consideration here aimed at both alleviating social distress and procuring deserved rewards for veterans,²⁷⁶ and were all characterised by the hope of relocating

²⁷⁴ See Chapter 3: 73ff.

²⁷⁵ On the other ideas, besides *libertas*, adopted to discuss the issue of land distribution see Chapter 3: 150–2.

²⁷⁶ Brunt 1988: 241. Gabba 1951: 171–272 (= 1973: 47–158). Cf. also Vell. Pat. 1.15.5.

the city population and providing them as well as the rural poor with a secure livelihood by owning their own land. Once Caesar, as consul, succeeded where the tribunes Rullus and Flavius had failed, the agrarian question, deeply transformed, became part of a profoundly changed world. Before then, however, those who opposed the implementation of agrarian redistributions always succeeded in their resistance.

The proposal of land distribution was described and widely perceived by contemporaries as a *popularis* issue. The very name of the agrarian law was considered *popularis* in nature (*hoc populare legis agrariae nomen*),²⁷⁷ and all those politicians who wished to pose as *populares*, friends of the people, were expected to propose either an agrarian distribution, or a remission of debts or possibly both.²⁷⁸

This important feature of Roman agrarian distribution should not obscure the fact (also highlighted in previous chapters) that the participants in this debate could be described as *optimates* and *populares* according to the contingent stance they took on the issue, and the related conception of politics they made use of to conceive and argue their case. In 60 BC, for example, the tribune of the plebs Flavius proposed a land distribution, which Cicero described in a letter to Atticus an ‘irresponsible affair (*sane levis*)’.²⁷⁹ When Flavius included the proletariat amongst the beneficiaries of the law in order to receive their support,²⁸⁰ Cicero intervened in the debate and heavily amended Flavius’ measure, which, with the introduction of the urban plebs amongst the grantees, was now very close to Rullus’ scheme of three years earlier. Cicero’s amendments were so radical that the measure should have become agreeable to the senate. Maintaining the provision on the purchase of land by the quinquennial fund established from the eastern provincial *vectigal*, Cicero removed everything that could have threatened the *status quo*: the distribution of land declared public at the time of Tiberius Gracchus’ tribunate, the removal of the right of ownership from the *agri Sullani*, and the assignment of the already confiscated and never distributed territory of Volaterrae and Arretium. Rendered in this way inoffensive, Cicero claims, the measure had nothing *popularis* left in it except its instigator.²⁸¹ In his attempt to alleviate the socio-economic distress perceived to be affecting Rome, but

²⁷⁷ Cic. *Leg. agr.* 2.63; cf. Livy 2.41.7.

²⁷⁸ Cic. *Off.* 2.78. Cf. also 1.20, 51, 3.21–24, *Rep.* 1.49. On *populares* and *optimates* see Introduction: 8.

²⁷⁹ Cic. *Att.* 1.18.6. ²⁸⁰ Dio Cass. 37.50.1.

²⁸¹ Cic. *Att.* 1.19.4. Rejecting Shackleton Bailey’s amendment, Badian 1977 has convincingly demonstrated the correctness of the transmitted text and its reference to Pompey.

without approval of land distribution per se, Cicero had maintained the well-to-do as his privileged political interlocutors, and his political actions were still in defence of Sparta, as he metaphorically calls the optimate side, to which he declared his loyalty for the rest of his life.²⁸² Yet, the year after, Cicero describes the same Flavius as *observantissimus* towards himself, a man almost unrelated, it seems, to the *popularis* politician who had presented an irresponsible measure that the orator had to rework considerably to the point of almost perverting its nature. In 59 BC the two politicians were so close that Cicero is found to have interceded with his brother Quintus on Flavius' behalf, in the hope of securing him the aid he required.²⁸³

However, this fluidity of Roman political culture coexisted with a sharp polarisation of the political debate which occurred each time that a proposal of land distribution was brought forward. As Livy states when discussing the *rogatio Cassia*, the first agrarian measure, traditionally assigned to 485 BC, 'This was the first proposal for agrarian legislation, and from that day to within living memory (*usque ad hanc memoriam*) it has never been brought up without occasioning the most disastrous disturbances.'²⁸⁴

The strenuous opposition that rose each time a proposal of agrarian distribution was brought forward never focused on matters of detail, but rather rejected the principle of redistribution of public land *tout court*. Regardless of the intended beneficiaries or the modalities devised to implement the redistributions, there never was an agrarian proposal that did not provoke strong resistance.²⁸⁵ As Cicero hints in the *pro Sestio*, agrarian laws were always viewed with the greatest suspicion by their opponents because they were regarded as tampering with the existing economic and ultimately political structure of the Republic.²⁸⁶ Since Roman military, economic and political structure was mainly based on the centuriate system, arranged in such a way as to guarantee that the wealthiest of the city took upon themselves the role of political leaders as well as of defenders of the *res publica*, each proposal of land distribution could be perceived as an attempt to deprive the commonwealth of its protectors and shake the very foundations of its institutions.²⁸⁷

²⁸² Cic. *Att.* 1.20.3; cf. 2.1.8.

²⁸³ On the relationship between Cicero and Flavius see Cic. *Q. fr.* 1.2.10–11, dated between 25th October and 10th December 59 BC, that is one year after this agrarian episode, in which Cicero asks his brother to provide his aid to Flavius, described as *observantisimus* towards Cicero. On Flavius *RE* 6.2: 2528, 17.

²⁸⁴ Livy 2.41.2–3. Cf. Ogilvie 1965; *ad loc.* who emphasises the role of *hanc memoriam*. See also Cic. *Rep.* 2.60; cf. *Att.* 2.15.1

²⁸⁵ Ferrary 1982: 752. ²⁸⁶ Cic. *Sest.* 103.

²⁸⁷ On the ideological substratum of land distribution see Chapter 3: 143ff.

During the period under consideration here, the attempts at implementing agrarian reforms occurred at least four times, in 70 (most probably), in 63, in 60 and in 59 BC.

Most likely implemented in 70 BC, the *lex Plotia*, an almost unknown agrarian law, must have encountered a considerable degree of resistance, perhaps of the same intensity as that faced by the *lex Flavia* to which Cicero compares it: 'An agrarian law has been promulgated by Flavius, an irresponsible affair, pretty much the same as the *Plotia* (*agraria autem promulgata est a Flavio, sane levis, eadem fere quae fuit Plotia*).'²⁸⁸

On the basis of the parallel drawn by Cicero between the *rogatio Flavia* and the *lex Plotia* it is possible to infer that the latter would have contained some clauses relating to the *possessiones Sullanæ*, certainly present in Flavius' agrarian project,²⁸⁹ and consequently must be dated after Sulla and, possibly, after the re-establishment of the full powers of the tribunes in 70 BC.²⁹⁰ The activity of a tribune Plautius, author of the *lex dereditu Lepidanorum*, and also connected to a *lex de vi*, seems to be dated to either 70 or 69 BC.²⁹¹ Thus it has been concluded, although with a certain margin of uncertainty, that the *lex Plotia* is to be dated to 70 BC and its promoter to be identified with an otherwise little-known Plautius, perhaps one of Pompey's legates of 67 BC.²⁹² The law seems to have provided land allotments for the veterans of Pompey and Metellus who fought in the Spanish war.²⁹³

Pompey, in his attempt to secure the passage of Caesar's agrarian measure in 59 BC, from which his veterans would have benefited, claimed before the people that ten years earlier the senate had fully supported the *lex Plotia*.²⁹⁴ Unfortunately, he claimed, the distribution of land to his and Metellus' soldiers after the war against Sertorius could not have been implemented at the time, because of the scarcity of the treasury's resources.²⁹⁵ However, as a result of his conquests in the East, Pompey's argument ran, the financial state of the treasury had considerably improved

²⁸⁸ Cic. *Att.* 1.18.6. ²⁸⁹ See below 225–6.

²⁹⁰ See Gabba 1950: 66–8 (= 1973: 443–7).

²⁹¹ The only other known tribune with this name is M. Plautius Silvanus, who held the office in 89 BC. Taylor 1941: 121, n.32 dates the *lex Plautia dereditu Lepidanorum* to 70 BC. For an attribution of this tribune's activity to a year later cf. Niccolini, 1934, 346. Cf. also Broughton 1951–2: II 128.

²⁹² See Smith 1957: 85. The name Plotius is attested only in the quoted passage of Cicero's letter.

²⁹³ Gabba 1950: 66–8 (= 1973: 446–7).

²⁹⁴ Dio Cass. 38.5.1, although Freyburger-Galland 1997: 106 highlights that in Dio the word *ψηφισμα* can also refer to the senate's approval. The suggestion brought forward by Marshall, that the law was not voted on by the assembly, but received only the *placet* of the *senatus auctoritas*, should be rejected as not in accordance with the evidence; see Marshall 1972: 49–50.

²⁹⁵ A slightly different picture of the future application of this law appears in Plut. *Luc.* 34.4. Cf. Smith 1957, who first drew attention to this passage; Marshall 1972: 43–52 dismisses the passage as Clodius' rhetoric.

and now thanks to the passage of Caesar's measure the soldiers should be allowed to reap the fruits of their toils.²⁹⁶

Although some scholars have taken Pompey's words in Dio at face value and maintained that in 70 BC the senate agreed, or even actively promoted, this agrarian distribution,²⁹⁷ it seems that Pompey's claim of senatorial support for the *lex Plotia*, if ever truly expressed in those words by Pompey himself, was not much more than an instrumental twisting of reality.²⁹⁸ Even taking into account that the senators, still mindful of Sulla's example, were preoccupied by the presence of Pompey with his army at the gates of Rome,²⁹⁹ it should not be forgotten that Pompey was called on to advocate a measure from the implementation of which his soldiers would certainly have benefited. In doing so, he began his speech by declaring the senate's approval of Caesar's land distribution. Nothing was more untrue, and he knew it. The senate's consistent hostility to Caesar's measure was the reason why Pompey and indeed Crassus had been called to speak in favour of the proposal before the people. To back his point, Pompey referred to an alleged episode of at least ten years earlier, the senate's support for another land distribution, the *lex Plotia*, of which, once again, his soldiers would have been amongst the beneficiaries. Pompey, who did not worry about twisting the reality of something that was still *in fieri*, could quite safely hope to get away with another misrepresentation of an episode ten years old, such as the senate's approval of the *lex Plotia*. Cicero's derogatory association of this law with the *lex Flavia*, labelled as an 'irresponsible affair', is an attestation of the unfavourable light in which the *lex Plotia* was regarded in 60 BC and leads us to suppose that the *lex Plotia* must have encountered at least some degree of resistance and aversion at the time of its presentation.

If in 63 BC Rullus' proposal for land distribution was strenuously attacked by Cicero, before both the senate and the people, as the three orations that Cicero himself decided to publish in 60 BC attest,³⁰⁰ the following

²⁹⁶ Dio Cass. 38.5.1–2.

²⁹⁷ Mitchell 1979: 132–3; for an independent role of the senate in 70 BC see Sherwin-White 1956: 8; *contra* Brunt 1988: 265.

²⁹⁸ The overall similarity of tone and message between Dio Cass. 38.5 and Plut. *Pomp.* 47.4–5 may imply either a dependence of Dio on Plutarch or their dependence on a common source, to be identified, not implausibly, with Pompey's speeches. For a full discussion see van der Blom 2011: 564–5.

²⁹⁹ See Brunt 1971b: 312 and 1988: 265 on the influence exercised by the circumstances on the senate's attitude towards this measure.

³⁰⁰ Cic. *Att.* 2.1.3. Alongside literary and educational aims, the publication of the speeches fulfils the political function of showing the other guardians of the *status quo* the policies that should have been adopted to defend and preserve the traditional *libera res publica*, and the political values that should have been deployed in pursuing these policies. See Introduction: 2–3.

months of the same year saw the outbreak of socio-political agitation on the initiative of Catiline, which, according to Dio, touched upon the issue of land distribution.³⁰¹ [Catiline] assembled from Rome itself the lowest characters and such as were always eager for a revolution and as many as possible of the allies, by promising them cancellation of debts, distribution of land, and everything else by which he was most likely to tempt them.³⁰² However, Drummond has shown that the inclusion of land distribution in Catiline's demands was most probably an addition by Dio.³⁰³ Building on allusions found in his sources, Dio might have artificially established a parallel between the events of early 63 BC and those that occurred few months later.³⁰⁴ Drawing on one of the key elements of Catiline's appeals to the people, such as the cancellation of debts, Dio might have created a tribune to propose this motion, and, basing himself on the major legislative event of the year, Rullus' agrarian measure, might have attributed to Catiline a project of land distribution. A link between the Catilinarians' fate (according to their adversaries, necessary to free the *res publica*) and Catiline's campaigning to implement an agrarian reform appears nowhere in our sources, not least because, as seems most probable, this was never one of Catiline's demands.³⁰⁵

At the end of January 60 BC, however, writing to Atticus, Cicero reported the news that an agrarian proposal was being brought forward by Flavius. Conceived to grant land to Pompey's soldiers, as the comparison with the *lex Plotia* suggests,³⁰⁶ the law was concerned with the distribution of the available *ager publicus*, of the *agri Sullani*, and of the territory of Volaterrae and Arretium confiscated by Sulla, but still in the hands of its ancient possessors. The *vectigal* received from the provinces would have constituted a fund to buy other land, since the allotments made available were not sufficient to satisfy all of Pompey's veterans.³⁰⁷

³⁰¹ Dio Cass. 37.30.4 places Catiline's proposals of economic reforms after the election of 63 BC; Sall. *Cat.* 21.1 in 64 BC.

³⁰² Dio 37.30.2. Sall. *Cat.* 20–1 seems to hint vaguely at Catilina's claim to land distribution by evoking Tiberius Gracchus' rhetoric.

³⁰³ Drummond 1999. Different opinions about Catiline's agrarian proposal have been cautiously expressed: in favour of its existence are, for example, Rotondi 1912: 380 and Pani 1997: 217; *contra* Drummond 1999: 153 and Brunt 1988: 252.

³⁰⁴ Drummond 1999: 153. He also suggests that Dio could have been further influenced by the traditional Greek figure of revolutionary demagogues.

³⁰⁵ For a rather dubious allusion to Catiline's agrarian plan see Cic. *Mur.* 50–1 where he is described as the *dux* of the poor and the miserable.

³⁰⁶ Smith 1957: 83. Cf. Hermon 1992: 110 and 1993: 251–2 according to whom the *lex Flavia*, linked to the *lex Plotia* by an attempt to regulate the post-Sullan status of the Italian land, was a 'lighter' measure than the *lex Plotia*.

³⁰⁷ On the *rogatio Flavia* see Nicolet 1977: 139–40.

Cicero was extremely alarmed that Pompey was taking no position on the affair, while Crassus had said nothing about it for fear of losing popularity. The others, from whom Cicero had expected some support against the measure, were fools enough, Cicero laments, to think that they would have kept their fish-ponds of which they were so fond, even after the *res publica* had been destroyed as a result of the implementation of this law. Still, as he confesses to Atticus, Cicero could rely on Cato 'the one man who cares for that, with more resolution and integrity, it seems to me, than judgement or intelligence'.³⁰⁸ Rallying around Cato, the opposition to the measure began to make itself heard. The political climate became more heated, as at the centre of the debate were Pompey's powers, the ratification of his acts in the East and the desired reward for his soldiers.³⁰⁹ In the face of such great opposition, Flavius tried to overcome the obstacles by resorting to the political expedient of including the proletariat amongst the beneficiaries of the law, which, in turn, prompted Cicero's amendments to the law itself, although he once again repeated that his primary interlocutors remained the well-to-do. However, the pragmatic solution advocated by Cicero was met with obtuse opposition by the opponents of land distribution, since they feared that some new powers for Pompey were lurking behind the scheme.³¹⁰ Amongst its members, the most intransigent was Cato. Although Cicero regarded him highly, 'the fact remains,' he confessed to Atticus, 'that with all his patriotism and integrity he is sometimes a political liability. He speaks in the senate as though he were living in Plato's Republic instead of Romulus' cesspool.'³¹¹ Once any hope of compromise was frustrated, together with Cato, Lucullus and 'the rest who were of the same mind with them', the consul Metellus raised the game further and put up very firm resistance, which, eventually, brought the whole affair to nothing.³¹²

However, the essentially prejudiced nature of the opposition against land distribution appears most clearly in the case of Caesar's first agrarian law. Although the ancient sources do not supply much information on the substance of this first measure, it is possible to assert that the law, approved at the beginning of 59 BC, provided for a redistribution of public land and for the public purchase of other allotments. This operation was to be performed according to certain specific rules: the land was to be bought only from those willing to sell and at a price fixed by the previous census assessment; the funds, established to finance this operation, were to come from Pompey's new Eastern conquests. The whole scheme was to be

³⁰⁸ Cic. *Att.* 1.18.6.

³⁰⁹ Plut. *Cato min.* 31.1. See Nicolet 1958: 270.

³¹⁰ Cic. *Att.* 1.19.4.

³¹¹ Cic. *Att.* 2.1.8.

³¹² Dio Cass. 37.50; cf. Plut. *Luc.* 42.6.

supervised by a commission of twenty members, from which Caesar, the promoter of the measure, was excluded by law.³¹³ It follows that even the staunchest of the opponents to the measure could not have found anything wrong in it. Caesar seemed to have considered everything very carefully. He provided only for voluntary purchases of land, thus ruling out the ghost of possible confiscation, established that land acquisition should be made at a fixed price, so as to remove the chance of haggling, and debarred himself from the agrarian commission, so as to avoid the charge of aiming at personal profits. Above all, he provided for the exemption of the *ager Campanus*.³¹⁴

Thus by carefully eliminating any aspect that had contributed to the failure of Rullus' and Flavius' projects, Caesar had drafted a measure that could not be censured, and ostensibly 'no one ventured to open his mouth'.³¹⁵ The senators were even offered the opportunity to amend further the law, for each of them was called by name in the senate and asked for his criticism. Caesar could not have been more accommodating, but, nevertheless, the ground for a political conflict was already laid.

Since Cicero and the other like-minded people 'suspected that by this measure he [Caesar] would attach the multitude to him and gain fame and power over all men',³¹⁶ they decided to fight for the *res publica* and its *libertas*.³¹⁷ To avoid the accumulation of great power in the hands of Caesar, which would inevitably cost the commonwealth its liberty, they put up as strong resistance as they felt able. 'Even though no one spoke against him, no one expressed approval either. This sufficed for the majority, and while they kept promising him that they would pass the decree, they did nothing; on the contrary, fruitless delays and postponements kept arising.'³¹⁸ Dio Cassius reports that 'Marcus Cato, even if he had no fault to find with the measure, nevertheless urged them on general principles to abide by the existing system and to take no steps beyond it. He was a thoroughly upright man and disapproved of any innovation.'³¹⁹ However, violence broke out and, despite the fact that Caesar's proposal had been turned into law,³²⁰ the opposition did not accept defeat, but carried out an ultimately sterile

³¹³ Amongst the members of the commission were the leading politicians Pompey and Crassus (Dio Cass. 38.1.6–7), the experts on agriculture M. Terentius Varro (Plin. *HN* 7.176) and Cn. Tremellius Scrofa (Varro *Rust.* 1.2.10, on whom see Brunt 1972), and Caesar's *adfinis* M. Atius Balbus (Suet. *Aug.* 4.1). Caesar tried to involve Cicero himself, e.g. Cic. *Prov. cons.* 41.

³¹⁴ Caesar's agrarian law did not confirm the *Sullani* in their possession and, in contrast with Cicero's claims (Cic. *Fam.* 13.4.2), the Volaterrans, whose territory was confiscated by Sulla but never distributed, did not receive from Caesar any more than a general reassurance that they would not be displaced. See Brunt 1971a: 323.

³¹⁵ Dio Cass. 38.2.1.

³¹⁶ Dio Cass. 38.2.3.

³¹⁷ Cic. *Att.* 2.3.3–4.

³¹⁸ Dio Cass. 38.2.3.

³¹⁹ Dio Cass. 38.3.1.

³²⁰ On the legality of the procedure see Linderski 1965: esp. 425–6.

resistance by refusing to swear the prescribed oath that required obedience to the law.³²¹

A few months later, in April of the same year, Caesar enacted a second law according to which the *ager Campanus* was to be divided into allotments and distributed to new settlers, Pompey's veterans and the urban population.³²² As soon as it was realised that the available land was not sufficient to satisfy all needs, the second agrarian law provided that 'the land of Campania was given to those having three or more children'.³²³

When the news broke, Cicero could no longer sleep. The opposition to these measures had already suffered a terrible blow with the approval of the first agrarian law, and was still trying to come to terms with it. At the announcement of the distribution of the Campanian land, the shock was too great and Pompey's behaviour seemed incomprehensible.³²⁴ The only way in which Cicero could make sense of it was Pompey's search for personal power, which would have consequently brought the loss of liberty for the entire commonwealth. The distribution of the Campanian land embodied the despotic power of Caesar and his associates, and the necessity of enacting a political campaign for the *ager Campanus* was as urgent as the necessity of recovering liberty.

However, the nature of the opposition's next move in regard to the Campanian affair has been lost in the silence of the sources.³²⁵ A sign of its vitality may be detected in the fact that after a gap of two years, for which no information has survived, the issue of the *ager Campanus* was still part of the political conflict of the period after Caesar's consulship. In a letter to his brother of 57 BC, Cicero reports that in the Senate the tribune Rutilius Lupus 'discussed the question of the Campanian land with extreme particularity, and was listened to in profound silence. . . . There were stinging references to C. Caesar, some abuse of Gellius, some remonstrances with the absent Pompey'.³²⁶ The political climate was not the most secure, and the tribune did not ask the senators who attended the session for their votes,

³²¹ Dio Cass. 38.7.1; Plut. *Cato min.* 32.3–6.

³²² Dio Cass. 38.1.3; cf. Plut. *Cato min.* 31.4. On the provisions of the *lex Julia Agraria* and its relation with the so-called *lex Mamilia Roscia Peducaea Alliena Fabia* see Crawford 1989 and 1996: 11–54. For the date of promulgation see Taylor 1968 (1st May) and Seager 1979: 190–2 (April 59 BC).

³²³ Dio Cass. 38.7.3; cf. Suet. *Jul.* 20.3; App. *B. Civ.* 2.10; Cic. *Att.* 2.16.1. Vell. Pat. 2.44.4 reports that 20,000 citizens were established in the Campanian territory.

³²⁴ Cic. *Att.* 2.16.1–2.

³²⁵ For the few references to the actual opposition to the Campanian law see Plut. *Cato min.* 33.1–2: Cato was dragged to prison while speaking against the law and subsequently rescued thanks to the help of one of the tribunes.

³²⁶ Cic. *Q. fr.* 2.1.1.

for fear of burdening them with a personal wrangle. It was Cicero himself who in 56 BC proposed to debate once more the Campanian question in a full house, because, as he rhetorically asked his friend Lentulus, 'Was not that invading the innermost citadel of the ruling clique with a vengeance? And could I have shown myself more oblivious of my past vicissitudes or more mindful of my political record?'³²⁷

In 51 BC, when the *res publica* was inevitably coming to its end, Curio seems to have revived the question, but the precise terms of his proposal are entirely obscure.³²⁸ Nothing excited such a strenuous and consistent opposition as the distribution of the *ager Campanus*.

It is important to recognise that this consistent opposition to proposals of agrarian distribution was constantly conducted in the name of liberty. The three extant Ciceronian speeches against the *rogatio Servilia* constitute an excellent example of the manner in which the political debate on the agrarian question was carried out on the part of the opposition, and of the political values advocated in the first century BC in order to resist this sort of measure.³²⁹ In opposing the agrarian reform presented by Rullus, Cicero consistently referred to the principle of liberty, almost as if liberty itself and not land distribution was at stake.³³⁰ To oppose Rullus' agrarian measure was an act of *libertas*, and the approval of this reform would have led inevitably to its loss.

Brought forward at the beginning of 63 BC by the rather obscure tribune Servilius Rullus,³³¹ the law scheme provided for a redistribution of land which, by virtue of the renewed wealthy state of the treasury, could be conducted without raising the ghost of confiscations.³³² The treasury could

³²⁷ Cic. *Fam.* 1.9.8 on which see Stockton 1962; *contra* Balsdon 1957: 18–20. In 56 BC the distribution of the Campanian land was still a controversial subject, see Cic. *Q. fr.* 2.6.2.

³²⁸ Cic. *Fam.* 8.10.4.

³²⁹ The publication of these three speeches just three years after their delivery and their circulation within elite circles at the same time as the heated political debate around the *rogatio Flavia* (Cic. *Att.* 1.19.4) supports the idea that the speeches reproduced the political values advocated by Cicero and expected by the reader.

³³⁰ On the recurrence of liberty in the three Ciceronian speeches see Achard 1981: 456 and MacKendrick 1995: 24–57.

³³¹ For Cicero's allusions to sinister machinations orchestrated behind Rullus' manoeuvre see Cic. *Leg. agr.* 1.11, 1.16, 1.22, 2.20, 2.23, 2.44, 2.46, 2.63, 2.98. In favour of the existence of a plot led by Caesar and Crassus see Hardy 1924: 68–98, Jonkers 1963: 7–8, and Gelzer 1968: 42–5; *contra* Sumner 1966: 569–82 and Gruen 1995: 389.

³³² The only other ancient text that, alongside Cicero's orations, provides some information on the bill is Plutarch's *Life of Cicero*, which Agnes 1943: 35–45 convincingly proved to be wholly dependent on Cicero's speeches. Other references to this agrarian proposal do not seem to provide additional information about the clauses of the law: Cic. *Pis.* 4, *Rab. perd.* 32, *Sull.* 65, *Fam.* 13.4.2; Dio Cass. 37.25.3–4; Plin. *HN* 7.117, 8.210; Quint. *Inst.* 2.16.7; Gell. *NA* 7.16.7. For the reconstruction of the provisions of the law see Ferrary 1988b and Crawford 1996: 11 52. On the political and economic

afford the establishment of a fund for the purchase of land to be assigned in allotments. This fund was to be financed by the sale of public sites in the city as well as in Italy,³³³ by the sale of foreign territory which had fallen into Roman hands since 88 BC, that is to say portions of the *ager publicus* in Asia Minor, Cyprus and, perhaps, Egypt,³³⁴ and by the imposition of taxes upon those public lands not authorised for sale, to which there was eventually to be added the use of booty and spoils from victorious wars.³³⁵ This ready availability of money would have secured the possibility of buying land only from those willing to sell, and, providing them with the promise of generous compensation, would have guaranteed an immediate and positive response from many indebted senators.³³⁶ Besides the new acquisition of land, the *rogatio Servilia* provided also for the use and distribution of the publicly owned territory still available in Italy, the *ager Campanus* and *ager Stellas*, whose revenues, now that the treasury was so enriched, would not have been missed. Untouched by either the largesse of the Gracchi or the domination of Sulla, the Campanian land would have provided a rich territory where new settlers could have been accommodated.³³⁷ Most likely the first beneficiary of Rullus' reform, for whom there was an immediate need of available territory (such as the *ager Campanus* and *ager Stellas*) and of liquid capital to purchase further land, was the urban plebs.³³⁸ Together with the urban population of Rome, the other beneficiaries of the law, for whom new colonies were also to be founded, were those who were still paying the consequences of Sulla's policy and whose confiscated land was, according to Rullus' programme, to be maintained as such. They were the desperate rural poor, left from Sulla's time without plots to cultivate, the old veterans, who did not have a place to return to, and the heirs of those proscribed by Sulla, once men of substance, now completely dispossessed. To them had to be added Pompey's veterans, still at war in Asia, but whose

interpretation of the law see Hardy 1924: 68–98, Jonkers 1963, Gabba 1966 (revised 1973: 449–58) and Sumner 1966.

³³³ Cic. *Leg. agr.* 1.3–4, 2.35–37. ³³⁴ Cic. *Leg. agr.* 1.1–2, 2.38–46.

³³⁵ On the imposition of taxes Cic. *Leg. agr.* 1.10, 2.56–7, 2.62; on booty Cic. *Leg. agr.* 1.12–13, 2.59.

³³⁶ Val. Max. 4.8.3. See Gruen 1995: 390 and Wiseman 1994: 350.

³³⁷ Cic. *Leg. agr.* 1.20, 2.76, 2.85, 2.96. For the land status in Campania during the Republic see Vallant 1981. On the political and economic importance of Capua see Hardy 1924: 92–4 and Gabba 1976: 56–9. For the hegemonic centrality of Capua see Heurgon 1942; cf. also Frederiksen 1984.

³³⁸ Cf. Cic. *Leg. agr.* 2.70–1. According to Cic. *Leg. agr.* 2.79 the first grantees of land would have been those enrolled in the rural tribes, that is, most likely dispossessed farmers who, having moved into Rome, were waiting for the opportunity of returning to the countryside. See Thommen 1989: 51–2 and Gruen 1995: 393–4. *Contra* Brunt 1988: 245 and 251 who marginalises the interest of the urban population in agrarian reform.

return was soon expected.³³⁹ The whole scheme was to be administered by a board of ten commissioners set up by Rullus himself, elected by the vote of seventeen tribes chosen by lot and provided with praetorian *imperium* for five years.

Proceeding according to the criteria of the Aristotelian syllogism, Cicero redescribes his political behaviour before the people and presents himself as the real *popularis*, the genuine friend of the people:³⁴⁰ ‘Since I am aware that I have been elected consul, not by the zeal of powerful men, nor by the distinguished favours of a few, but by the deliberate judgement of the Roman people (*universi populi Romani iudicio*), in such a way that I was by a large majority preferred to men of the highest rank, it is impossible for me to avoid acting as the people’s friend (*popularis*) while I hold this office and throughout my life?’³⁴¹ However, Cicero’s logical argument runs, nothing is more *popularis* than liberty: ‘For what is so welcome to the people as peace (*quid enim est tam populare quam pax?*), in which not only those animals whom nature has endowed with sense, but even the houses and fields appear to me to rejoice? What is so welcome to the people as liberty (*quid tam populare quam libertas?*), which you see is sought out and preferred to everything else not only by men but also by beasts? What is so welcome to the people as tranquillity (*quid tam populare quam otium?*), which is so delightful that both you and your ancestors and the bravest of men think that the greatest labours ought to be undertaken in order to enjoy repose particularly if in command and high rank?’³⁴²

Therefore, if Cicero is a genuine *popularis* and nothing is so *popularis* as liberty, it follows that Cicero can only act according to the principle of liberty. ‘How then can I help being on the side of the people, Romans, when I see that all these things – peace abroad, liberty the characteristic of your race and name, tranquillity at home, in short, everything that is dear and important to you, were entrusted to my keeping and, as it were, to the protection of my consulship?’³⁴³

Cicero, the argument continues, is not hostile to agrarian laws in principle.³⁴⁴ Indeed, as soon as Rullus’ law was publicly available (since the tribune kept him aloof from all the planning sessions, or so he claims) he was eager to examine it and find it advantageous for the people.³⁴⁵ But

³³⁹ Cic. *Leg. agr.* 2.54. Sumner 1966 stresses particularly the role of Pompey’s veterans within Rullus’ scheme.

³⁴⁰ For the Ciceronian use of the word *popularis* see Seager 1972a and Ferrary 1982: 723–804, esp. 728–30, 749, n.22 and 770.

³⁴¹ Cic. *Leg. agr.* 2.7.

³⁴² Cic. *Leg. agr.* 2.9.

³⁴³ Cic. *Leg. agr.* 2.9.

³⁴⁴ Cic. *Leg. agr.* 2.10.

³⁴⁵ Cic. *Leg. agr.* 2.11–14.

the only idea that he was able to find was that: 'ten kings of the treasury, the revenues, all the provinces and the entire Republic, of kingdoms allied with us, of free people – in fact, ten lords of the whole world, should be set up under the pretence and name of an agrarian law'.³⁴⁶

As a consul for whom the preservation of peace (domestic and foreign) and liberty are the primary aims, Cicero cannot even remotely accept this law whose true purpose is obvious: 'Is it not clear that a king is being set up, is it not your liberty that is being destroyed?'³⁴⁷ Deliberately emphasising the extraordinary powers assigned to the commissioners by the law, Cicero states: 'Just observe what immense power they are invested with; you will recognise that it is not the madness of private individuals, but the immoderate arrogance of kings. In the first place they are allowed unlimited power of procuring enormous sums of money . . .'³⁴⁸

The true nature of the decemvirs' power, which places them in a position of domination over the rest of the community, lies in their capacity to act as they wish without the restriction of any form of constraints. As Cicero states by citing allegedly the text of the law before the senate, 'Did you think that none of us would understand what kind of a plan was intended in your wish to fill the whole of Italy with your colonies? For it is written THE DECEMVIRI SHALL SETTLE ANY COLONISTS THEY LIKE IN WHATEVER MUNICIPAL TOWNS AND COLONIES THEY CHOOSE, AND ASSIGN THEM LANDS WHEREVER THEY PLEASE so that, after they have occupied the whole of Italy with their soldiery, we may have little hope left of retaining our dignity, and still less of recovering our liberty.'³⁴⁹

All the politicians who opposed land distribution claimed that the implementation of these measures would invariably lead to the loss of liberty. Not only was this danger inherent in the special powers conferred on the commissioners in charge of its enactment, but also in the enormous popularity earned by the proposer of the measure among its beneficiaries, often the urban plebs and the veterans.

Adopting the same argument used by Cicero against Rullus, in opposing Caesar's first agrarian law Cato 'declared that he was afraid not of the distribution of land, but of the reward which would be paid for this to those who were enticing the people with such favours'.³⁵⁰ It was not the distribution of allotments to those in need that Cato thwarted, but the implicit danger that the free commonwealth would incur. If the threat to the liberty of the commonwealth was already spotted in the excess of popularity

³⁴⁶ Cic. *Leg. agr.* 2.16.

³⁴⁷ Cic. *Leg. agr.* 2.75.

³⁴⁸ Cic. *Leg. agr.* 2.33–4.

³⁴⁹ Cic. *Leg. agr.* 1.17.

³⁵⁰ Plut. *Cato min.* 31.5.

that the first *lex Iulia agraria* could confer on Caesar, as well as on Pompey, whose soldiers would receive their allotment, the passage of Caesar's second agrarian law left nobody in doubt: 'He [Pompey] is confessedly working for absolute power (ὁμολογουμένως τυραννίδα συσκευάζεται),' Cicero comments to Atticus, 'what else signifies this sudden marriage connection, or the Campanian domain, or the pouring out of money? . . . They can't like these measures in and for themselves. They would never have come so far if they were not paving their way to other and disastrous objectives.'³⁵¹

The only plausible explanation that Cicero can find for Pompey's support of Caesar's agrarian law, a law in itself despicable, is the search for personal power, whose affirmation would seal the loss of liberty for the whole commonwealth. In fact, once the *leges Iuliae* had been implemented, any opposition seemed futile, and, as Cicero laments to Atticus, their enactment meant the loss of liberty. 'Well, we are held down on all sides,' Cicero writes to his friend, 'we don't object any longer to the loss of our freedom, but fear death and expulsion as greater evils, which are really far lesser . . . the whole situation has reached a point at which no hope remains of even magistrates, let alone private individuals, ever becoming free men again.' Cicero finds faint cause for hope of recovering liberty in the gesture of Laterensis, who had been willing to renounce his candidature for the tribunate in order to avoid taking the prescribed oath on the Campanian law, thereby preserving his integrity; a sign, as Cicero interprets it, that in the midst of the suppression of liberty, 'Indignation is beginning to get the upper hand of fear, although,' he laments 'not enough to lift the cloud of blank despair.'³⁵²

Those who opposed the agrarian measures also had recourse to forms of political theatre that, publicly staged, could provide the observers with a visual symbolism of immediate clarity. During the political struggle on Caesar's first agrarian proposal, when Caesar was about to drag Cato to prison to halt his relentless opposition, contrary to what Caesar might have imagined Cato 'offered himself with the greatest readiness to be led away', making sure that this scene was publicly witnessed and that other senators followed him. When 'one of them, Marcus Petreius, upon being rebuked by Caesar because he was taking his departure before the senate was yet dismissed, replied: "I prefer to be with Cato in prison rather than here with you"', it was clear that Cato had succeeded in presenting Caesar as acting

³⁵¹ Cic. *Att.* 2.17.1; cf. Livy 2.41.2–5.

³⁵² Cic. *Att.* 2.18.1–2. For Laterensis' refusal to take the oath, which seems to have been restricted to the candidates in the forthcoming elections, see Schol. Bob. 161–3 St.

against the traditional patterns of the *libera res publica*.³⁵³ Determined to capitalise on Caesar's behaviour, Cato not only did not cease talking, but 'as he walked along continued to discuss the law, and advised the people to put a stop to such legislation'.³⁵⁴ The powerful symbolic meaning was immediately readable to everyone: the true defender of Roman Republican liberty was Cato, and the implementation of Caesar's agrarian law would have set up a form of tyranny over the commonwealth.

Nor was Cato isolated in staging an opposition of this nature. The year before Caesar's consulship, alongside Cato, Lucullus and others of similar inclinations, the consul Metellus kept strenuously opposing Flavius' proposal. Their position became even firmer after the tribune's addition of the urban plebs amongst the beneficiaries of the law.³⁵⁵ In the face of such obstruction, Flavius, probably on the day of the vote, put Metellus in prison. This move provided Metellus with a great opportunity to stage a political scene that would publicly declare Flavius the true enemy of Republican liberty. He decided to assemble the senate there, so as, perhaps, to amend the measure.³⁵⁶ Flavius set the tribune's bench at the entrance of the cell so as to obstruct anyone's entrance. Metellus then ordered the wall of the prison to be cut through so that the senate might gain entrance. Flavius' obstinacy in following his opponent onto his territory proved to be a mistake, as it reinforced further the image of him which Metellus and his associates wished to cultivate, as the infringer of the traditional patterns of the *libera res publica*. As a result, Pompey, afraid to lose the people's support for the law, directed Flavius to withdraw and at the beginning of June 60 BC Cicero could describe Flavius' bill as a *vieux jeu* which no longer constituted a threat.³⁵⁷

By resorting to different means, all these politicians consistently emphasised that their opposition to land distributions was motivated by a desire to preserve the liberty of the commonwealth. They were not adverse to agrarian reforms per se, which, if found advantageous, would have been met with their approval.³⁵⁸ Rather they all claimed to be forced into opposing these measures as the only course of action available to them to preserve the liberty of the commonwealth. They argued that distributions of public

³⁵³ Dio Cass. 38.3.2; cf. Plut. *Caes.* 14.7. The obstruction by Cato is reported by Ateius Capito (fr. 18 Huschke, 2 Bremer) in Gell. *NA* 4.10.8. Val. Max. 2.10.7 attributes the episode to the tax farmers' affair. see also Suet. *Jul.* 20.4.

³⁵⁴ Plut. *Cat. min.* 33.1–2 (although, contrary to Dio, Plutarch places Cato's incarceration in relation to Caesar's second agrarian law, it seems that the two attestations refer to the same episode).

³⁵⁵ Dio Cass. 37.50.1; cf. Plut. *Luc.* 42.6.

³⁵⁶ Nicolet 1958: 270.

³⁵⁷ Dio Cass. 37.50.3–4; Cic. *Att.* 2.1.6.

³⁵⁸ Cic. *Leg. agr.* 2.10; Plut. *Cato min.* 31.5.

land jeopardised the very foundation of the *res publica* and its true liberty for the following main reasons: first, because of the nature of the commissioners' extraordinary powers (which included, at least in the case of the *rogatio Servilia*, also the procedures of their appointment); second, because of the establishment of new colonies.

As far as the first reason is concerned, they all claimed that this sort of measure was so structured that it inevitably required the conferral of an excessive amount of power on the commissioners in charge of its implementation, a practice that in itself could be perceived as against the *mos maiorum*.³⁵⁹ By focusing on the special role assigned to the commissioners, they could exploit very similar arguments to those deployed against *potestates extraordinariae* and highlight the threat that these assignments posed to the liberty of the commonwealth. In 60 BC, the amended version of Flavius' agrarian measure, despite its neutralised nature, was met with the highest degree of resistance, since it was feared that behind the scheme some new powers for Pompey were in view.³⁶⁰ The senate was suspicious of the authority that would have been required to administer the actual implementation of the law, in the same way as they had been three years before with regard to Rullus' scheme. The implementation of such ambitious reforms would have necessarily required the conferral of extraordinary powers on those in charge. In 63 BC this had already given Cicero the opportunity to launch his attacks against the ten commissioners of Rullus' bill, who, provided with extraordinary powers, had been easily depicted by his oratory as tyrants. A similar fear was now spread amongst the senators who would not have been able to tolerate the grant of special powers to Pompey.

It was as if Cicero had won his argument against Rullus' proposal when he had claimed that the distribution of land, in itself a good measure, would inevitably have established the tyranny of the commissioners to whom extraordinary powers were to be granted. His successful rhetorical move had instilled in the audience, in the case of the *rogatio Flavia* particularly in the senate, a fear of land distribution, the implementation of which would have required the assignment of special powers to a group of individuals.

As primarily attested by Cicero's speeches against the *rogatio Servilia*, those who opposed land distribution could articulate their claims concerning the commissioners and their violation of Roman liberty in two main ways. First, they claimed that the setting up of special commissioners in charge of the implementation of land distributions was incompatible with

³⁵⁹ Dio Cass. 38.2.3.

³⁶⁰ Cic. *Att.* 1.19.4.

liberty, because of the nature of their invested powers, which, bereft of any form of constraints, would have placed them above the rest of the community. Second, and most evidently attested in the case of Rullus' proposal, the procedures put in place to appoint the commissioners seriously undermined, so they argued, the liberty of the citizens and of the commonwealth.

According to the provisions of Rullus' bill, the *decemvir* were granted unlimited and uncontrolled power of procuring money, of administering justice, and of establishing new colonies wherever they wished, for a period of five years. 'Besides all this, he [Rullus] gives them authority praetorian in name, but kingly in reality,' Cicero caustically commented.³⁶¹ Their powers, Cicero's argument continued, were protected by such bulwarks that it would have been impossible to deprive them of it against their own will. Provided with all sorts of support, from clerks to tents and mules, they would have had an enormous amount of money at their disposal and would have been entrusted with unlimited powers to acquire even more from the revenues of the Roman people.

However, alongside the temporal limit of the office tenure and their granted capacity to procure money, Cicero emphasised two important features of their special powers which could be easily construed and widely perceived as a threat to liberty: on the one hand, their role in administering justice, on the other, their completely free rein in managing the territory.

As far as justice is concerned, the *decemviri* would be allowed to pursue any judicial inquiries they wished without resorting to proper judges; they would be allowed to punish anyone without any right of appeal being permitted, and to condemn without there being any means of procuring a reversal of their sentence. Rendering redundant the lawfully appointed judges, Cicero claims, they would arrogate to themselves the right to judge and would trample over the right to *intercessio* and to *provocatio*, the two traditional strongholds of Roman liberty. During their tenure of office they would be above the law, the guarantee of *libertas par excellence*, since they would be able 'to sit in judgment on the consuls, or even on the tribunes of the people themselves', without anyone being able to sit in judgment on them. 'They will be allowed to fill magisterial offices; but they will not be allowed to be prosecuted.'³⁶²

As far as their administration of the land is concerned, their powers would be bereft of any constraints. 'They will have power to purchase lands, from whomsoever they choose, whatever they choose, and at whatever price they choose. They are allowed to establish new colonies, to recruit old

³⁶¹ Cic. *Leg. agr.* 2.32.

³⁶² Cic. *Leg. agr.* 2.34. See [Chapter 2](#): 66–7.

ones, to fill all Italy with their colonists; they have absolute authority for visiting every province, for depriving free people of their lands, for giving or taking away kingdoms, whenever they please.³⁶³ The powers granted to the *decemviri* would set them up in a position of domination over the rest of the commonwealth, as they would be allowed to behave entirely according to their wishes without any form of constraint on their behaviour.

Alongside the nature of the commissioners' powers, Cicero articulated the claim that the *decemviri* (and, by extension, the implementation of land distribution itself) violated Roman liberty by the mechanisms of their appointment.

In Cicero's opinion, the procedure for electing the *decemviri* was unacceptable as it represented the most patent violation of the people's political liberty. The law provided for the election of a board of ten commissioners by the vote of only seventeen tribes, out of a total of thirty-five, which would have been chosen by lot.³⁶⁴ It followed that it would have been sufficient that during the election nine tribes agreed and the procedure would have been over, and with it, Cicero argues, the political liberty of all the excluded Roman citizens. 'In the first clause of this agrarian law,' Cicero stated before the people, 'a slight attempt is made to see, as they think, in what sort of temper you can put up with a diminution of your liberty (*libertatis vestrae deminutionem*). For it orders the tribune of the people, who has passed that law, to create *decemviri* by the votes of seventeen tribes, so that whomsoever nine tribes elect shall be *decemvir*. Here I ask for what reason he has made this the beginning of his proposals and laws – that the Roman people shall be deprived of their right of voting (*ut populus Romanus suffragio privaretur*). . . . it was left to a tribune before anyone else to deprive the entire Roman people of their votes, and to invite only a few tribes, not according to established legal rules but by accidental kindness of the lot, to exercise their liberty.'³⁶⁵

It took a tribune of the plebs, Cicero argues, the defender of Roman *libertas par excellence*, to rob the Roman citizens of their right to vote. He would have been in charge of the entire voting procedure in which only a small part of the entire constituency would have taken part.

To reinforce the perception that this whole procedure was an attack on liberty and aimed at setting up a tyranny over Rome, Cicero emphasised that Rullus, the proposer of the law, put himself in charge of the

³⁶³ Cic. *leg. agr.* 2.34.

³⁶⁴ This electoral process was based on that used for electing *pontifices* under the *lex Domitia* of 104 BC: Cic. *Leg. agr.* 2.18.

³⁶⁵ Cic. *Leg. agr.* 2.16–17. On the validity of this method in order to avoid bribery see Gruen 1995: 389–90.

commission, a move (cunningly avoided by Caesar in 59 BC) have been which could have been described as an attempt at attaining domination over the commonwealth.³⁶⁶

'It is kings,' Cicero states over and over again, 'that are being set up over us, not *decemviri*, O Romans (*reges constituuntur, non decemviri, Quirites*); such are the beginnings or foundations on which their power is based, that even from the moment of their appointment, not only when they begin to exercise their functions, all your rights, all your powers, and all your liberty will be swept away (*omne vestrum ius, potestas libertasque tollatur*).'³⁶⁷

It follows that in Cicero's arguments the manner of appointment of the *decemviri* deprives the people of their liberty in a variety of ways. First of all, it divests the citizens of their right to vote, one of the basic means to guarantee their liberty; second, it robs the *comitia* of their essential function of granting powers to the magistrates, whose capacities received legitimacy through the popular assembly.

In turn, it follows that the *decemviri*, having not received their power according to the Republican traditional patterns, were bereft of any form of constraint on their behaviour, which could be exercised entirely at their wishes. If the whole apparatus of secretaries, lictors, criers, with which the commissioners were endowed, Cicero explains, might appear on the whole negligible to the citizens, what should not escape their attention is that 'these things are of such a nature that the man who has them without their being conferred by your vote, must seem either a monarch with intolerable power, or if he assumes them as a private individual, a madman'.³⁶⁸

However, not only did Rullus' proposal set up illegitimate tyrants, depriving the *comitia* of their political function, essential to the preservation of the liberty of the commonwealth, but additionally provided them with rights equal to those of magistrates who had been regularly elected. The additional provision of the *rogatio Servilia*, which required that the '*decemviri* should have the same rights as the magistrates elected in the strictest accordance with the law', shows the patent violation of liberty that this proposal enacted. In a commonwealth, Cicero argues, 'which is far before all other commonwealths in the rights accorded to liberty, none should be able to obtain civil or military power without the approval of any of the *comitia*', and yet Rullus' measure established that even 'without a *lex curiata* the *decemviri* should have the same rights as they would have if they had been appointed in the strictest accordance with the law'.³⁶⁹

³⁶⁶ Cic. *Leg. agr.* 2.20–1. ³⁶⁷ Cic. *Leg. agr.* 2.29; cf. 2.15.

³⁶⁸ Cic. *Leg. agr.* 2.32. ³⁶⁹ Cic. *Leg. agr.* 2.29.

Strictly related to the nature of the commissioners' extraordinary powers, although rather distinct from it, the second reason advanced to explain why measures regarding distribution of land could be deemed liable to endanger Roman liberty concerned the establishment of new settlements. As is well exemplified in Cicero's speeches against Rullus' proposal, which represent the most extensive surviving attestation of the argument against agrarian distribution in the period under consideration,³⁷⁰ alongside the danger to liberty constituted by the nature of the commissioners' extraordinary powers and by the procedures according which they had been bestowed, the opposition claimed that the implementation of land distribution would be detrimental to liberty, as it would subject Rome to the domination of an external power.

The commissioners' power to found new colonies and administer the whole territory outside Rome led Cicero, in his opposition to the *rogatio Servilia*, to represent Rome as the centre of freedom, and the *decemviri*, with their plans of establishing colonies from which an attack could be launched against Rome, as a terrible threat to liberty itself.

The ultimate threat to Roman *libertas* that Rullus and his followers could pose was the establishment of new colonies. Enlarging the geographical picture in front of the eyes of his audience and readers, Cicero depicts the spheres in which the power of the *decemviri* could be exercised: the *orbis terrarum*, where the commissioners are entitled to sell whatever they like; Italy, where new colonies and municipal towns will be founded; and eventually Capua, the hostile town that now will be called again to life by the *decemviri*. The more the geographical sequence narrows down, the more the danger for liberty inexorably increases. By identifying Rome as the embodiment of *libertas*, Cicero portrays the abandonment of the city as tantamount to renouncing liberty.³⁷¹

All the strategic sites around Rome would be occupied, and even the Janiculum would be used as a base to control and terrify Rome.³⁷² Then the whole of Italy would be occupied with Rullus' garrisons, and by authorising the *decemviri* to settle any citizens they choose in every municipality and every colony of the whole of Italy, as Cicero rhetorically emphasises, the same men would be in a position to possess wealth and a vast population under their control to hold all Italy under siege.³⁷³ If this should happen, Cicero asks, 'when they shall also have your liberty hemmed in by their garrisons and colonies, what hope, I ask you, what means of recovering

³⁷⁰ See above 226 on the opposition to the *rogatio Flavia* based on the fear of these powers.

³⁷¹ See also Cic. *Leg. agr.* 2.71. ³⁷² Cic. *Leg. agr.* 2.73–4. ³⁷³ Cic. *Leg. agr.* 2.75; cf. 1.17.

your liberty will be left to you?’ It is clear, Cicero claims, that Rullus and the *decemviri* are after greater resources and defences than Roman liberty can tolerate, and about to set themselves up as kings, destroying liberty.³⁷⁴

The establishment of colonies can be depicted by Cicero as being directed against liberty, since from these newly founded towns there could emerge a future invader of Rome. The epitome of this external threat is Capua, the ancient rival of Rome, from which the most dangerous menace to Roman liberty might come. Drawing on an old stereotype, Cicero paints an extremely frightening picture of the Campanian town, which once had already had the courage to stand up to Rome and offer aid to Hannibal.³⁷⁵ ‘If a place and city, able to organise and make war, is being sought for 5,000 men, chosen with a view to violence, crime and murder, will you nevertheless suffer their resources to be strengthened, their garrisons to be armed, cities, lands, and troops to be got ready to oppose you under cover of your name?’³⁷⁶

It is there that Rullus would establish his army that, made up by passionate men, disposed to violence and ready for revolution, would take arms at his signal against Rome. ‘Then that standard of a Campanian colony, so formidable to our empire, will be planted in Capua by the *decemviri*, then they will try to make a second Rome to oppose this Rome of ours, the common fatherland of all of us (*contra hanc Romam, communem patriam omnium nostrum, illa altera Roma quaeretur*).’³⁷⁷

The spectre of the threat that Capua could pose resonated strongly amongst all Romans. Speaking before the senate, in one of the few passages of the speech where liberty is explicitly mentioned, Cicero states he is ‘now speaking of the danger to our safety and liberty. For what do you think will be left to you unimpaired in the Republic or in the maintenance of your liberty and dignity, after Rullus and those whom you fear much more than Rullus, with all his band of beggars and scoundrels, with all his forces, with all his silver and gold, has occupied Capua and the surrounding cities?’³⁷⁸

It follows that it is of extreme importance that Rullus’ proposal should not be approved. If the law were to be enacted, there would be the risk, if not the certainty, that an external power could take control of Rome, and as such Roman *libertas* would be annulled by a foreign tyranny exercised over it. ‘Yet, believe me,’ Cicero asserts before the people, ‘it is for men of

³⁷⁴ Cic. *Leg. agr.* 2.75.

³⁷⁵ Cic. *Leg. agr.* 2.87–91 and *passim*. See Vasaly 1993: 231–41 for the best account of Cicero’s representation of Capua and the role played by the opposition against Gaius Gracchus’ proposal to refound Carthage.

³⁷⁶ Cic. *Leg. agr.* 2.77.

³⁷⁷ Cic. *Leg. agr.* 2.86.

³⁷⁸ Cic. *Leg. agr.* 1.21–22; see also 1.19–20.

that kind that Campanian territory and the beautiful Capua are reserved; an army has been raised against you, against your liberty, against Gnaeus Pompeius; it is against the city of Rome that Capua is to be opposed, against you that bands of audacious scoundrels are being organised; against Gnaeus Pompeius that ten generals are being appointed.³⁷⁹

Developing its argument from the range of extraordinary powers assigned to the commissioners in charge of the implementation of this measure, the opposition to land distribution could show that agrarian reforms were detrimental to liberty as they would subject Rome to the domination of a foreign power. Adding a further dimension to the arguments adopted in the struggle against *imperium extraordinarium*, the opposition claimed that the implementation of land distribution could be liable to threaten the liberty of the commonwealth by exposing it to the domination of an external power.

Alongside a tyranny of ten men within the city, the reforms concerning land distribution would create settlements of (primarily) veterans and urban plebs, who, grateful for the received benefit, would constitute a loyal force in the hands of the proposer of the law and his supporters. The fear of the level of popularity that land distribution could confer upon its advocate was widely spread, and constituted one of the main reasons why agrarian reforms were opposed in the name of liberty. Provided with the military capacity to besiege Rome, if they wished to do so, the proposers and supporters of land distribution could have been represented as a danger to the liberty of the commonwealth. With the potential to turn themselves into enemies of Rome, the commissioners for the implementation of this measure and, more generally, the advocates of land distribution could be described by the opposition as posing a threat to *libertas* from outside the city.

Ultimately, the basic assumption all these politicians shared was the notion that the preservation of the liberty of the commonwealth required two essential conditions: first, it required that no one in the commonwealth was in the position to exert domination over the rest of the community; second, it required that no one outside the commonwealth was able to dominate the civic community.

Those who opposed the measures concerning land distribution could easily show how the implementation of agrarian reforms would

³⁷⁹ Cic. *Leg. agr.* 3.16. Pompey, champion of liberty, was damaged by this bill not only because it required the candidates for the commission to be present in person, but also because the *decemviri* had planned to sell the lands he ought to have had authority over, even before the definitive end of the Mithridatic war; see Cic. *Leg. agr.* 1.5–6, 1.13, 2.25.

necessarily require the conferral of extraordinary powers to the commissioners in charge of their enactment. The extension of such powers and their unconstrained nature, as well as the procedures of the appointment of the commissioners, would inevitably grant the commissioners the capacity to exercise their domination over the rest of the community. Analogously, the opposition could describe the establishment of settlements and the redistribution of land amongst different inhabitants, inherent in any agrarian reform, as the setting up of potentially rival communities, deeply loyal to their benefactors, who could pose a serious threat to the commonwealth and its liberty.

By articulating their disapproval according to these two main lines of argument, those who opposed agrarian measures succeeded in avoiding the claim that the actual distribution of land was per se a reform leading to the loss of the commonwealth's liberty. In the arguments of the opposition, this idea was construed along the lines of a notion shared by everyone in Rome, whatever political traditions on this value they might have appealed to, which held a commonwealth to be free when in a status of non-subjection to the arbitrary will of either a foreign power or a domestic group or individual. By referring to this shared ideal, the opponents to these measures could claim that, by virtue of that liberty which even the supporters of these measures cherished, the implementation of land distribution could be described as seriously endangering the liberty of the commonwealth.

However, they could never have hoped to succeed if they had chosen to claim that the principles behind agrarian measures themselves were detrimental to liberty. The political acumen of the opponents of land distribution consisted in understanding that according to the '*popularis*' tradition on Roman liberty, the distribution of public land in equal lots was congruent with the preservation of the liberty of the commonwealth.³⁸⁰ It follows that they decided to emphasise the role of the land commissioners and the potential threat posed by the settlements, as these would have allowed them to show that land distributions were indeed measures that would have been detrimental to liberty. Most of all, it allowed them to present their adversaries as politicians of blinkered political sensibilities, who failed to realise that the policy they put forward could be described as undermining the ideal of liberty as they themselves conceived it.

Only once does Cicero come close to claiming that the actual distribution of land is disadvantageous to liberty. The agrarian measure brought

³⁸⁰ See [Chapter 3](#): 143ff.

forward by Rullus, providing for distribution of publicly owned land to poorly identified people, or worse, to Rullus, his followers and armed friends, was in terms of principle almost equivalent to depriving legitimate owners of their own land. In advocating firm opposition to this measure, Cicero plays with words and concepts, referring to the abstract meaning of *populus/publicus*, but does not mention the political value of liberty:

‘You are selling the Scantian wood; it is in the possession of the Roman people. I defend it. You are dividing the Campanian territory; it is you, Romans, who are in possession of it. I refuse to give it up. Next I see the possessions in Italy, Sicily and the other provinces are for sale and advertised by this law: they are your estate, your possessions; I shall resist and oppose this, and, as long as I am consul, I will not permit the Roman people to be turned out of its possessions by anyone, especially since no advantage is sought for you.’³⁸¹

Since those who proposed and supported land distribution professed to believe that policies which set up a potential *dominus* either within or without the commonwealth had the effect of undermining political liberty, it follows that, as everyone could easily recognise, to oppose these measures was tantamount to championing *libertas*.

³⁸¹ Cic. *Leg. agr.* 3.15.

Political response and the need for legitimacy

In order to comprehend fully why those who opposed the conferral of extraordinary powers and the enactment of land distribution and who supported the so-called '*senatus consultum ultimum*' consistently made use of the idea of *libertas* to justify their political behaviour, it is important to consider in turn the ideas put forward by those who resisted this course of action against their adversaries.

Faced by this consistent opposition to their line of action, those who endorsed it described their adversaries, on the one hand, as *superbi*, *libidinosi* and *licentiosi*, and, on the other, as engaged in a course of action that was tantamount to attempting at establishing a *dominatio*, alongside other deplorable forms of government. Although a precise correspondence between the nature of the attacks and the policies advocated is rather difficult to reconstruct, a close reading of contemporary texts referring to similar matters could provide a suggestion for the use of these terms of political invective in the cases under discussion.

Those who opposed any form of economic relief could be portrayed by Sallust's Catiline as affected by *superbia* and a wretched love of wealth, and as tyrants abounding in riches, squandering them in building upon the sea and in levelling mountains while the rest lacked the means to buy the bare necessities of life.¹ As the Catilinarian Gaius Manlius observes in his message to Marcius Rex (as reported by Sallust), their attitude of *superbia* had in the past also caused the people to fight for their own rights and secede from Rome.²

Every time a Roman leading politician could be reasonably perceived as pursuing exclusively his own political and economic interests, he made

¹ On *superbia* see most recently the excellent treatment by Baraz 2008. For the relationship between the notion of *superbia* and wealth, see Haffter 1956. On *libido* and *superbia* as terms of political invective see Dunkle 1967; Sall. *Cat.* 20.9–10.

² Sall. *Cat.* 33.3.

himself liable to the accusation of both *superbia* and *licentia*, the excessive *libido* for power exercised without any restraint.³ These were the derogatory characteristics usually attributed to a despot or a tyrant, that is to a ruler (or rulers) who abused his (or their) power, and were adopted in such a manner in Roman political discourse of the late Republic.

Resulting from the discrepancy between the judgement that an individual or group gives of itself and its role in society and an external judgement to which is attributed a value of objectivity, *adrogantia*, *insolentia* and, most of all, *superbia* indicate (in political terms) a failure to comprehend the existing power relation and, in the case of *superbia* in particular, contain an element of transgression inherent in the desire to exceed one's own true stature.⁴

In accusing their opponents of *superbia*, those who endorsed the conferral of extraordinary powers, the enactment of land distribution and who opposed the use of the '*senatus consultum ultimum*' in essence accused them of aspiring to an excessive accumulation of power, and created a perception of them as potentially very dangerous. In fact, not only was this accusation often used in conjunction with the charge of aiming at *regnum* (as well exemplified by the figure of Tarquinius Superbus), but it was also often associated with the accusation of *dominatio*, the second major charge levelled at them, which signified the imposition of the political will of an individual or a section of society on others.⁵

Although at times referring to the exercise of power by a single man, such as Cinna, Sulla, Clodius or even Cicero, *dominatio* is also often used to indicate the dominion of a group.⁶ Sallust reports Licinius Macer depicting as *dominatio* the powers of his adversaries in the fight for the full restoration of the tribunes' rights.⁷ He vehemently accuses them of having established a *dominatio* by taking over the treasury, the army, the kingdoms and the provinces.⁸ They have eliminated, he claims, all previous popular achievements; even the right to vote independently of the sanction of the patricians has been forgotten, opening the way to the *dominatio* of the few. 'We fight and conquer for the benefit of the few,' Licinius states, 'whatever happens, the plebs are treated as the conquered. This will be the more so as

³ Weische 1966: 52–7; Hellegouarc'h 1972: 558–9. Cf. ps.-Sall. *Ep. ad Caes.* 3.4.

⁴ Baraz 2008. ⁵ Sall. *Cat.* 6.7; Cic. *Leg. agr.* 3.13; Tac. *Ann.* 6.42.2.

⁶ On Sulla see Sall. *Hist.* 1.48.24Mc. On his satellites see Sall. *Hist.* 1.48.2Mc.

⁷ Sall. *Hist.* 3.34.3Mc.

⁸ Sall. *Hist.* 3.34.6Mc. These accusations recur frequently in Sallust's works: regarding the treasury, Sall. *Cat.* 38.3; the provinces, Sall. *Cat.* 20.7, *Jug.* 41.7; the spoils of war, Sall. *Cat.* 20.8; *Hist.* 1.48.7Mc, 3.34.15Mc.

the days go, by so long as they make greater efforts to retain their mastery (*dominatio*) than you do to regain your freedom.⁹

Often associated, on the one hand, with accumulation of wealth and related resistance to any reforms of economic relief (land distribution included), and, on the other, with unscrupulous concentration of power, administered as absolute prerogative, in the late Republic *dominatio* was universally perceived as a very negative accusation, which conveyed the notion of the power of a *factio*, a group of politicians exclusively interested in achieving their own interests.¹⁰ To be accused of establishing *dominatio* was to be accused of arbitrarily imposing the will of one's own group on the rest of the community, that is of behaving in such a way as to interfere with the interests and wishes of the community (interference, which, at least in principle, could either accidentally or by the goodwill of the *factio* be in tune with the wishes of the community).¹¹

'Those who propose to take charge of the affairs of government,' Cicero states in the *de officiis*, 'should hold fast to Plato's two rules: first, to keep so clearly in view what is beneficial to the citizens that, forgetful of their own advantages, they will make their every action conform to that; second, to care for the welfare of the whole body of the commonwealth rather than protect one part and neglect the rest. For the administration of the government, like a guardianship, must be conducted in the light of what is beneficial to those entrusted to one's care, not of those to whom it is entrusted. Now, those who take care of the interests of a part of the citizens and neglect another part, introduce into a commonwealth a truly ruinous element – unrest and strife.'¹² Since they exclusively pursued the interests of their group, the political activity of the *factio* would have led to the disruption of the essential value of *concordia* and, eventually, to the establishment of an oligarchy.

Although advocating the ideal of *concordia* amongst the members of the civic community, Cicero was not against the principle of internal political battles, as long as they were fair and not disruptive for the commonwealth. It was only when the *partes* and their principal protagonists involved in this

⁹ Sall. *Hist.* 3.34.28Mc (trans. by McGushin 1994). It is interesting to note that the historian Licinius (with whom Sallust's speaker can be identified) inserted complaints into his own history about the inequitable division of spoil or land whereby the plebs was deprived of their due: Livy 2.41.3, 2.42. 1, 4.49.10. See Ogilvie 1965: 11–2. See also Ogilvie 1958: 40–6 and Wiseman 2009: 17–24 and 59–80. On Licinius Macer see Walt 1997. Cornell 1999 expresses scepticism on the identification of C. Licinius Macer the tribune of 73 BC with Licinius Macer the historian.

¹⁰ Sall. *Jug.* 31.15–16, cf. also 31.20, *Hist.* 1.12Mc, 3.34.11Mc; cf. *Cat.* 38.3. As for the meaning of *pauci* in Sallust see Paananen 1972; on *factio* see Seager 1972b and Brunt 1988: 443–502.

¹¹ See Livy 4.5.1: *dominatio* is imposed every time that *imperium*, in whichever hands it is, is not associated with the people to whom it legitimately belongs; Ogilvie 1965.

¹² Cic. *Off.* 1.85; cf. Dyck 1996: *ad loc.* Cf. Sall. *Jug.* 41–2, *Hist.* 1.8 Mc.

political battle became exclusively interested in their own advantage that these political groupings were transformed into *factiones*.¹³ This negative counterpart of *partes*, whose members did not possess the political *virtus* which would have allowed the mixed constitution to function properly, was extremely dangerous for the commonwealth.¹⁴

According to Cicero, an oligarchy can be generated either by the overthrow of a tyrant by 'the bolder sort', who, by doing so, replace a tyrannical form of government with simply a tyranny of another kind, or from the corruption of 'the excellent rule of an aristocracy, when some bad influence turns the leading citizens themselves from the right path. Thus the ruling power of the state, like a ball, is snatched from kings by tyrants, from tyrants to aristocrats or the people, and from them again by an oligarchic faction or a tyrant (*aut factiones aut tyranni*), so that no single form of government maintains itself very long.'¹⁵

As long recognised in scholarship, the accusation of *dominatio* was most often levelled at those who styled themselves as *optimates*, acted in support of the *status quo* and referred to the ideological tradition which I have correspondingly labelled 'optimat'.¹⁶ Signifying an arbitrary imposition of the will of an elite group over the rest of the commonwealth with little regard for other institutional and social components of the body politic, the accusation of *dominatio* could appear *prima facie* tantamount to the charge of establishing an oligarchy.

Alongside *regnum*, which originally referred to the constitutional form of monarchy and by the first century BC had become the most odious term to any Roman,¹⁷ and tyranny, its negative equivalent, further amplified in

¹³ Cic. *Rep.* 1.69. Seager 1972b esp. with regard to the different meaning of *factio* in Cic. *Rep.* 1.69 ('faction, group') and 1.44 ('concerted action' with a pejorative tone). The two meanings, though, as Seager himself asserts (p. 56), are closely connected, since the transition from the notion of 'concerted exercise of influence by a group' to that one of 'group engaged in concerted exercise of influence' is easy and inevitable.

¹⁴ Lepore 1954: 273. See also Ferrary 1982: 767–71.

¹⁵ Cic. *Rep.* 1.68. Cf. Zetzel 1995: *ad loc.* who underlines the absence in either Plato or Polybius of this version of constitutional change from a tyranny to an aristocracy, and maintains that Cicero would have had in mind the fall of Tiberius Gracchus. See Sharples 1986: esp. 36–9 on Cicero's variety of the succession of constitutions (contrary to Polybius' rather fixed cycle).

¹⁶ The fact that the *optimates* were more often accused of *dominatio*, while the *populares* were of *regnum* has long been noted: Wirszubski 1950: 40 and 64, Hellegouarc'h 1972: 560–3, Ferrary 1982: 762–5, Mackie 1992: 51–2 and Pani 1997: 230. On this political terminology see most recently Martin 1994.

¹⁷ On the difference between *rex* and tyrant see Cic. *Rep.* 2.47–8; cf. also 3.47. See Béranger 1935: esp. 90f. The Roman hatred for *regnum* is usually associated with the expulsion of the kings: see Dunkle 1967: 156ff. Earl 1963: 107 supposes that the accusations of *regnum* 'belong to the jargon of the post-Sullan politics'. Erskine 1991 has convincingly argued for a very strong connection between the Romans' aversion to *regnum* and their experience of Hellenistic monarchies. See also Martin 1991 and 1994, and, most recently, Smith 2011. By the first century BC the figure of the tyrant became codified in the rhetorical tradition of the schools see Tabacco 1985.

its resonance by the Greek tragic figure of the tyrant, the term *dominatio*, applied to a group of politicians, was closely connected to an oligarchic form of government, but – it is important to underline – did not entirely coincide with it.¹⁸

As Wirszubski rightly noted, the charge of *dominatio* was a sort of loose term of political invective which did not belong to the realm of constitutional language. However, a full appreciation of the differences between the accusation of *dominatio* and the charge of establishing an oligarchy will help to understand further the exact character of the term *dominatio*, and, in turn, the nature of the rhetorical struggle carried out in the name of liberty.¹⁹

In the political discourse of the late Republic, the form of government established in Athens by the Thirty Tyrants at the end of the Peloponnesian War and in Rome by the *decemviri* in the fifth century BC constituted the two topical examples often adopted to illustrate the shortcomings of the oligarchic form of government.²⁰

Their recurrence in Cicero's *de republica*, where they appear first as examples of the degenerate form of aristocracy and second, in Book 3, as not fulfilling the definitional criteria of a commonwealth, function as an attestation of the conception of oligarchy in circulation in Rome in the late Republic.²¹ Although there is no doubt that these passages are profoundly inspired by Greek philosophical notions, since the argument Cicero makes Scipio advance is based on the literary sense of the Latin term *res publica*, for which there is no Greek equivalent, Scipio's discussion must also attest a way of conceiving oligarchy that, however Greek in origin and inspiration, belonged also to the Roman intellectual world of the first century BC.²²

If the Athenian government of the Thirty Tyrants is presented as the counterpart to the aristocratic government of the Massaliotes, whose *pauci et principes* had been replaced by a *factio*, in Book 2 Cicero applies the Greek constitutional theory previously discussed to the reading of the historical reality of Rome and represents the establishment of the decemvirate as the setting up of an oligarchic government.²³

¹⁸ The difference between *dominatio* and oligarchy is hinted at, but not fully developed by Martin 1982: 11 107–9. As for *dominatus* and its relation to *dominatio* see Hellegouarc'h 1972: 562–5 and Arena 2007b. It is interesting to notice that Cicero prefers to use *dominatio* to *dominatus* in the pre-exile writings, while after 56 BC his preference is inverted.

¹⁹ Wirszubski 1950: 64.

²⁰ Cic. *Rep.* 1.44, 2.61; Sall. *Cat.* 51; Livy 3.33–42; Dion. Hal. *Ant. Rom.* 11.28; Flor. 1.17.24. The government of the Massiliotes (Marseilles) was a standard example of a good and stable aristocracy: Cic. *Flac.* 63; Strabo 4.1.5.

²¹ For the Greek world see Ostwald 2000b (= 2009). ²² See Chapter 3: 118–19.

²³ See chapters in Powell and North 2001, esp. Powell 2001 and Cornell 2001.

According to Cicero's narrative, in 451 BC the first decemvirate established a good code of law by acting according to the principles of equity and justice.²⁴ However, the second decemvirate, which succeeded to power the year after, embodied the true degeneration of an aristocratic government.²⁵ Not only did they refuse to leave office and be replaced by duly elected magistrates, but they also did not allow the election of any other magistrate (including that of the tribunes of the plebs) to be carried out and, like the previous decemvirate, operated in a juridical system devoid of any right of appeal to the people against execution or scourging.²⁶

In Cicero's as in Livy's account, the main difference between the first and second decemvirate lies in the absolute lack of any sense of justice traceable in the actions of the latter. In the eyes of late Republican authors, what made the second decemvirate an oligarchy was, on the one hand, the accumulation of unlimited and unconstrained powers in the sole hands of the *decemviri*, and, on the other, the corresponding annulment of any institutional and legal structure which guaranteed the liberty of the *res publica*. In fact, reporting the behaviour of Gaius Julius as the only positive feature of the second decemvirate, both Cicero and Livy (the episode is absent in Dionysius of Halicarnassus) emphasise his willingness to operate with justice. They state that having seen a corpse dug up in the chamber of Lucius Sestius, 'a member of the nobility, Julius, although he himself held the supreme power, because no appeal was permitted from the sentence of any *decemvir*, merely demanded that Lucius give bail for his appearance: he explained that he would not violate that excellent law which forbade a Roman citizen to be tried for his life except before the centuriate assembly'.²⁷

However, unlike Livy's narrative, where the election of a board of ten men was the result of a compromise between patricians and plebeians – who opposed each other in the hope that the *decemviri* 'might propose measures that should be advantageous to both sides and secure liberty'²⁸ (and which, however, gave rise to an oligarchy) – for Cicero the establishment of the decemvirate was the manifestation of the process of the degeneration of an aristocracy into an oligarchy.²⁹

Drawing most probably on Polybius,³⁰ Cicero fitted the historical account of early Rome into the theory of constitutional cycles, with the

²⁴ Cic. *Rep.* 2.61. ²⁵ See von Ungern-Sternberg 1986.

²⁶ Cic. *Rep.* 2.62–3. The injustice alluded to is the episode of Verginia; see Livy 3.44–9.

²⁷ Cic. *Rep.* 2.61; Livy 3.32.9–10. ²⁸ Livy 3.31.7.

²⁹ Livy 3.33–42 and Ogilvie 1965: 451–5. On the differences between Cicero's and Livy's account see Zetzel 1995: 219.

³⁰ Taeger 1922: 100–9; Pöschl 1936: 47–107; Brink and Walbank 1954: 113–15; and Ferrary 1984: 90–2.

aristocracy of the early Republic eventually degenerating into the oligarchy of the decemvirate, falling victim to its cyclical permutation.³¹ Although even in Cicero's account the disgraceful lust of one of the *decemviri* for Verginia acted as the spark that precipitated the end of the decemvirate's oligarchic dominion, the deepest cause for its fall lay in the weakness intrinsic to any simple form of government.³² Thus, deriving most likely from Polybius, the decemvirate in Cicero was presented as an example of an oligarchic regime whose *factio* prevailed over the other members of society.

However, if in Cicero's analysis of Book 1 oligarchy was a negative form of government, in Book 3, according to the definitional criterion of a commonwealth laid down by Cicero himself in the first book, an oligarchy appeared not to be a *res publica* at all.³³ By referring to the definition of *res publica* stated in Book 1, Scipio claims that none of the three degenerate forms of commonwealth could be regarded as *res publica*. According to the famous definition, 'a *res publica* is the property of the people. A people is not any gathering of humans assembled in any sort of way, but it is a gathering of people in large numbers associated into a partnership with one another by an agreement on law and a sharing of benefits'.³⁴

As Schofield has observed, it follows that for a *res publica* to be the property of the people, it is essential that the people are assembled together on the basis of two crucial criteria: on the one hand, the agreement with respect to justice (*iuris consensus*), and, on the other, the sharing of benefit (*utilitatis communio*). However, in Book 3, in the light of the discussion on justice Scipio refines and slightly alters this definition. In a commonwealth, Scipio argues, not only do the citizens apportion benefits according to the individuals' contribution to the community, but also – a feature whose importance did not escape Augustine – share an agreement on *ius*, that is on moral justice as well as shared laws.³⁵

It follows, Scipio's argument continues, that just as a tyranny could never be called 'property of the people', which is what commonwealth means, since the people in the complete absence of a bond of justice are

³¹ Walbank 1972: 149.

³² Wiseman 1979: 107 suggests that the guilty *decemvir* was named later by Valerius Antias.

³³ For the interpretation of Cicero's definition as a criterion of legitimacy see Schofield 1995a (= 1999). His analysis is of extreme importance for the following argument.

³⁴ Cic. *Rep.* 1.39. The works on Cicero's definition of *res publica* are numerous. In addition to the texts referred to here and in previous chapters, see the bibliographical collections by Schmidt 1973 and Suerbaum 1978.

³⁵ Aug *De civ. D.* 2.21. Cf. Cicero's definition of *civitates* '*concilia coetusque hominum iure sociati*' (*Rep.* 6.13.2). For the stress on 'Rechtsstaat' Stark 1967: 44–5.

oppressed by the cruelty of one man,³⁶ so an oligarchy where everything is under the control of a *factio* cannot truly be called a *res publica*. When the Thirty Tyrants governed Athens most unjustly (*iniustissime*), the 'property of the Athenian people' was nowhere to be found and equally, Scipio proceeds, when the *decemviri* ruled Rome without being bound by the *leges de provocatione*, there was no 'property of the people'.³⁷ Oligarchy, therefore, was not a negative form of government, but rather not a commonwealth at all.

It seems clear why the opponents of the conferral of extraordinary powers, the implementation of land distribution, and the resistance to the '*senatus consultum ultimum*' accused their adversaries, advocates of such measures, of *dominatio* rather than of setting up an oligarchy. In the political and cultural discourse of the late Republic, the accusation of *dominatio*, universally recognised as highly unfavourable, signified a position of power, which, even if formally legal, was not fully compatible with the preservation of the *res publica* and its liberty.³⁸

Contrary to the charge of establishing an oligarchy, the accusation of *dominatio* implied that those against whom the charge was levelled arbitrarily interfered with the will of the rest of the community, or what could be plausibly portrayed as such, but without disregarding the shared notion of justice (understood as law) or necessarily trampling over the interests of the community. In pursuing their course of action, they could not be reasonably represented as violating the existing laws and their behaviour could be construed, in more or less justifiable terms, as acting in defence of the common interest. However, at the same time, they could be credibly portrayed by the adversaries and perceived by the wider audience as engaging in a despicable and potentially dangerous behaviour. By imposing their sectarian will (which might or might not be in accord with the wishes of the remaining civic body) over the rest of the community, their political behaviour could be plausibly represented and perceived as liable to subvert the *libera res publica* and establish an oligarchy. The leadership of the commonwealth by a faction could run the risk of introducing corruption in government, and, in turn, in society, away from the justice and mutual advantage of all its components.³⁹

Faced with this sort of accusation, those who opposed these measures (the conferral of extraordinary powers, the enactment of land distribution and the resistance to the '*senatus consultum ultimum*') could not

³⁶ Cic. *Rep.* 3.43.

³⁷ Cic. *Rep.* 3.44.

³⁸ For an analogous reading of the term *regnum* see Wirszubski 1950: 62–4.

³⁹ Schofield 1995a: 74 (= 1999: 187).

seriously attempt to deny that their course of action could be subject to such an unfavourable evaluation, which regarded their political behaviour as morally dubious and politically dangerous for the preservation of the mixed and balanced *libera res publica*. They did not act like the Thirty Tyrants in Athens or the *decemviri* in Rome, who annulled the most basic popular rights. Although they did not deprive the Roman citizens of their already acquired rights and did not subvert the existing 'constitutional' order, they introduced a very dangerous element of instability in its structure. To impose the political will of one's own group meant dispossessing, even if only temporarily and arguably in the name of the common interest, the people of its own *res*, thereby depriving them of their rights over its management and use.⁴⁰

Needing an explicit and plausible justification for engaging in this course of action, if they wished to succeed in imposing their policies, they resorted to the political principle of *libertas* as a means of characterising their course of actions and alleged motive for engaging with it.⁴¹ They claimed that by opposing the conferral of extraordinary powers and the implementation of land distribution they defended the liberty of the commonwealth from the condition of domination exercised by those on whom special powers had to be bestowed, whether they were either the single individual appointed to solve a crisis situation or the commissioners in charge of the enactment of the agrarian reforms. By opposing the resistance to the '*senatus consultum ultimum*', they claimed to support one of the most effective means to protect the liberty of the commonwealth from the domination of an external power.

It now becomes clearer why those who consistently took the same stance on those issues unfailingly claimed to be acting in the name of liberty. They realised that they required a justification to legitimate their course of action. By resorting to central political values and beliefs as a source of legitimacy, they referred to this widely accepted political principle, central to Roman identity, to redescribe their political behaviour in positive evaluative terms in order to confer legitimacy on it.⁴²

They had become familiar with the intellectual traditions on the value of liberty during their philosophical education, and had learnt its importance and effective deployment in political debates during their rhetorical training.

⁴⁰ For the metaphorical sense of property of the definition '*res publica est res populi*' (Cic. *Rep.* 1.39), see Schofield 1995a: 75–7 (= 1999: 188–9). *Contra* Kohns 1970 and Perelli 1972.

⁴¹ Skinner 2002: I 145–57; and II 344–67.

⁴² The notion of legitimacy and the treatment of 'legitimacy domination' was first introduced by Weber 1964: 157 and *passim*. A very interesting refinement of Weber's theory of legitimacy is to be found in Beetham 1991: 3–41 (at 15–24 on the role of 'normative justifiability') and 2001.

By the 70s, no elite education was considered complete if not complemented by a cultural tour of Greece where the young Roman would have had the opportunity to listen to philosophers and orators.⁴³ Although this fashionable practice had already begun in the second century BC,⁴⁴ it was in the first century that the cultural interests of the Roman aristocracy became so strongly Greek-orientated that for Cicero it was natural to represent himself in his dialogue with his brother Quintus, their cousin Lucius and their friends Atticus and Pupius Piso studying in Athens.⁴⁵

The acquaintance of members of the Roman elite with Greek philosophy was also nourished by the visits paid to Rome by Greek or Greek-speaking philosophers, many of whom decided to stay and live under the protection and patronage of members of the Roman ruling class. Licinius Lucullus took under his roof the Academic Antiochus of Ascalon; Cicero, the Stoic Diodotus, who died in his house leaving him a large sum of money; Cato the Younger gave hospitality to amongst others the Stoic Athenodorus Cordylion.⁴⁶

As Rawson noted, by the mid first century BC, a considerable knowledge concerning the tenets of the various schools and their representatives was widespread amongst the Roman elite.⁴⁷

As Cicero attests in the *de finibus*, although they found Chrysippus quite comprehensive, the Roman elite still read Diogenes, Antipater, Mnesarchus, Panaetius and many others, especially Posidonius,⁴⁸ and in the *de lingua latina* Varro declares that in dealing with the science of etymology, he feels more confident of being able to understand the higher levels of this science (that is the explanation of the words of the philosophers) since he has studied Chrysippus and Antipater, as well as the grammarians and Aristophanes of Byzantium.⁴⁹

If philosophical knowledge was one of the essential qualities required by public speakers to win their case in political debates,⁵⁰ through their

⁴³ See Crawford 1978 and Rawson 1985.

⁴⁴ Cic. *De or.* 1.75, *Brut.* 131, *Fin.* 1.8–9 = Lucilius 2.88ff. Marx. ⁴⁵ Cic. *Fin.* 5.1.

⁴⁶ For Licinius Lucullus see Cic. *Luc.* 4–7; for Cicero see Cic. *Brut.* 309; for Cato Plut. *Cato min.* 16. For a useful list of Greek and Greek-speaking scholars attached to prominent Romans, see Balsdon 1979: 54–8. For Cato and the philosophers see Plut. *Cato min.* 4.1, 4.10, 57.2, 65.5; Plin. *HN* 7.113; Cic. *Off.* 2.86.

⁴⁷ Rawson 1985: 282–3. ⁴⁸ Cic. *Fin.* 1.6.

⁴⁹ Varro *Ling.* 6.2; cf. 5.7–9, 9.1. See Rawson 1985: 284 for Antipater in Varro's *Menippean Satires*. On Antipater and Diogenes as represented in Cicero's *de officiis* see Chapter 3: 153–8.

⁵⁰ On philosophy and oratory see, for example, Cic. *De or.* 1.35–57, 81–93, 2.154–61, 3.56–143; *Brut.* 119–21; *Or.* 11–19, *Pert.* 139–40. For an updated survey of the quarrel about the supremacy of philosophy over rhetoric or vice versa, and the stance taken by Cicero, see May and Wisse 2001: 20–6 and 38–9; Mankin 2011: 35–41; Classen 1986 (= 1993); Leeman, Pinkster and Wisse 1996: IV 200–1, and May and Wisse 2001: 11–12 on the role of philosophical knowledge in the education of the ideal orator

rhetorical training these politicians also learnt how to frame their philosophical arguments to battle successfully the case in point. Future politicians had to apply themselves to rhetorical exercises which favoured the elaboration of the subject-matter in conceptual terms, and whose contents were also tightly bound to contemporary political reality.

Within the so-called *progymnasmata* (exercises in composition),⁵¹ in preparation for the most developed speeches the students were supposed to tackle subjects of a wider breath, such as 'Is it honourable to die for one's country?',⁵² 'How should friendship be cultivated?',⁵³ or 'Should virtue be sought for its own sake or for the advantage it brings?'⁵⁴ Designed to develop a student's ability to argue debatable questions,⁵⁵ this exercise, called the *thesis*, dealt with general subjects without reference to specific circumstances. By adding a specific reference to a given person, place or time, as the ancients themselves noticed, a general question such as 'What is the difference between a king and a tyrant?' or 'Is the interest of the majority right?'⁵⁶ was easily transformed into a discussion, for example, on the conferral of extraordinary powers or land distribution which it provided with a conceptual framework.⁵⁷ To be forced to think about these subjects in these terms would have armed the students with the conceptual and rhetorical weapons that would have been extremely useful in the political battles of the first century BC.

Once immersed in the specific reality, and provided with a proem and epilogue, the *thesis* would have come very close to a fully developed speech, and particularly close to a *suasoria* or a *dissuasoria* (the exercise where students were meant to persuade or dissuade historical or even legendary personages to undertake a certain course of action),⁵⁸ whose subjects dealt

as essentially practical: knowledge of the human mind and conduct play an important role in the orator's handling of the auditors' feelings and emotions, whilst familiarity with political theory is essential to the prominent political role of the orator.

⁵¹ An original treatment of Roman education is Morgan 1998: esp. on rhetoric 190–239.

⁵² Cic. *Top.* 84; cf. *De or.* 3.116–17. ⁵³ Cic. *Part. Or.* 62.

⁵⁴ Cic. *De or.* 3.112. For a list of the topics treated see Bonner 1949: 3–4.

⁵⁵ Cic. *Inv.* 1.8. Clarke 1951 assigns the *thesis* a limited place in the rhetorical teaching of the Republic.

⁵⁶ Cic. *Top.* 85, *De or.* 3.115.

⁵⁷ Cic. *Orat.* 46; Quint. *Inst.* 2.4.24–5, 3.5.5 ff. Cf. also Cic. *Att.* 9.4. See Quint. *Inst.* 10.5.11 and Cic. *Q. fr.* 3.3.4, where Cicero refers to his system of instruction as 'somewhat more scholarly and argumentative than that of the master of his nephew, who appears more attracted by that declamatory style'. Dunkle 1971–2: 19, n.33 points out the close connection between political reality and rhetorical exercises, and states that 'Cicero uses this *thesis* not as an oratorical exercise but as a means of deciding what course of action a citizen living under a tyrant (Caesar) should take.'

⁵⁸ Bonner 1977: 271–2. Still a very useful treatment of Roman declamations is Bonner 1949. On the importance of history in rhetorical training see Quint. *Inst.* 2.4.2–4. On the difference between actual history and its distorted use in rhetoric, Cic. *Brut.* 10.42–3. On the role played by historiography in ancient education see Nicolai 1992; on historical subjects of declamations see Kohl 1915: 109.

with anything from the Carthaginian Wars to the exemption from the law to be granted to Scipio in order that he should become consul before the statutory age.⁵⁹

Similarly, in the *controversiae* (exercises in the judicial oratory of the law courts on mythical as well as historical subjects)⁶⁰ not only does the preserved example of Brutus attest the use of the value of liberty in rhetorical exercise to describe a condition of dependence, but also the issue of the murder of Scipio Nasica and the persistent references to the Gracchi show the extent to which rhetorical training was concerned with providing political discussion with conceptual terms to argue a case.⁶¹ Familiarity with these tribunes, whose speeches were studied and memorised in the first century BC, and the ideas they adopted to support their measures would have equipped future politicians with the weapons needed to confront their colleagues in the probable event that a similar measure might be brought forward.

Versatile in philosophy and trained in public speaking, which taught them how to use these concepts in political arguments, these politicians understood that in order to apply a favourable evaluative description to their course of action, they should evoke the idea of *libertas* if they wished to entertain any serious hope of success. They tried to exhibit a plausible relationship between the political principle of *libertas* and their actual course of political actions, 'even if they were not really motivated by, and did not really believe in it at all'.⁶² What was essential for these politicians was to make it plausible that their political opposition, which their adversaries could plausibly describe as immoral and politically dangerous, was in reality motivated by *libertas* and could as such be persuasively presented as an act in its name.

Adopting the rhetorical technique of redescription, they applied a favourable evaluation to their behaviour.⁶³ This technique, called *distinctio*

⁵⁹ On subjects regarding the Carthaginian war see *Rhet. Her.* 3.2, Cic. *Inv.* 1.11, 1.17; cf. *De or.* 3.109; on Scipio's exceptional career *Rhet. Her.* 3.2. For a fine analysis of the *suasoriae* and *controversiae* in the *Rhetorica ad Herennium* see the still essential Marx 1894: 102–10; see also Calboli 1969.

⁶⁰ On invented cases meant to resemble reality see *Rhet. Her.* 1.19, 1.20, Cic. *Inv.* 1.18, 1.92, 2.153–4. For a collection of the examples in Books 1 and 2 of the *Rhetorica ad Herennium*, see Marx 1894: 104–10.

⁶¹ On Brutus see *Rhet. Her.* 4.66; cf. Calboli 1969: *ad loc.* The figure of the tyrant, extremely common in the rhetorical exercises of the early Empire, makes its first appearance as a theme of *controversiae* in Cic. *Inv.* 2.144; see Tabacco 1985. On the Gracchi see *Rhet. Her.* 4.2, 4.22, 4.31, 4.38, 4.42, 4.68. For the subject of *controversiae* see Marx 1894: 105–6 and Calboli 1969 *ad loc.* Cf. Cic. *Inv.* 2.52 on the tribunate of Flaminius in 232 BC. On Scipio Nasica's murder of Tiberius Gracchus see Chapter 3: 215–16.

⁶² Skinner 1974a: III (= rev. 2002: II 354).

⁶³ On the rhetorical technique of redescription as a way of reevaluating facts see Skinner 1996.

or παραδιαστολή,⁶⁴ which consisted of substituting a negative description with a rival positive term to cast the action under discussion in a positive light, was applied by the orator in his attempt to convince the public to accept the new description and therefore to adopt a new attitude towards the specific issues at stake.⁶⁵

If the application of the new, positive, description to their course of action was successful, they could hope, on the one hand, to override (if not defeat) the major criticism of *dominatio* launched against their political behaviour, and, on the other, to show implicitly that their opponents had simply failed to perceive that the conferral of extraordinary powers upon an individual to solve a crisis would have led to the establishment to the domination of one individual over the rest of the community, that the objection to the '*senatus consultum ultimum*' would have steered the *res publica* towards the potential domination of an external enemy, and that the implementation of a land distribution would have inevitably caused the establishment of commissioners endowed of extraordinary, unconstrained, powers, subjecting the rest of the civic body to their domination.

Those who pursued this course of action legitimated their behaviour specifically by professing the principle of *libertas*, because they recognised that a special plausibility was attached to the widely shared value of liberty. At a minimum level, this term indicated to all the condition of non-slavery. In political terms, it was tantamount to the status of Roman citizenship and could be preserved only in a commonwealth whose condition of non-domination from within and without needed to be preserved.

Although opponents did not take their profession of liberty as a genuine expression of their motives, they all agreed on the basic meaning of the term. They agreed that to fight against the establishment of domination on the part of a group or an individual from within or without the commonwealth deserved to be described as an act for liberty; that is, they all agreed that if it could sincerely be said that a politician was the guardian of Roman freedom, such a politician's behaviour was entitled to be respected and valued. By offering a plausible rival evaluative description of their own

⁶⁴ Lausberg 1998: §805 distinguishes two types of *distinctio* in ancient rhetoric: first, the semantic *distinctio* that displays a contrast between the normal and the emphatic meaning of the word, and second, the onomasiological *distinctio*, which consists in a remedy against the *conciliatio* of names. Quintilian's definition of παραδιαστολή, present also in Cornelius (fr. 7 Marx), probably derives from Rutilius Lupus (1.4). See Barbino 1967: 109–10, according to whom the passage derives instead from an oration against Aristophanes.

⁶⁵ For a definition of *distinctio* see *Rhet. Her.* 4.35; Quint. *Inst.* 9.3.65. On the cases where παραδιαστολή might be applied see Quint. *Inst.* 4.2.75–77; cf. Cic. *De or.* 2.106. On the neighbouring nature of vices and virtues and its Aristotelian origin see Cic. *Part. Or.* 81; Quint. *Inst.* 2.12.4, 3.7.25.

behaviour, their opponents were forced to accept that despite their *prima facie* dangerous behaviour, as potentially leading to the establishment of an oligarchy, their course of action was justifiable in the circumstances.

By appealing to the political value of liberty, the conferral of extraordinary powers on an individual, the recourse to the '*senatus consultum ultimum*', and the schemes for land distribution could enable a plausible representation of the supporters of these measures as liable to endanger the liberty of the commonwealth. These policies, according to the shared notion of liberty that informed the political discourse of the first century BC, could be represented as jeopardising Roman *libertas*.

It follows that consistently resorting to the same pattern of opposition provided them with the best chance of presenting their adversaries as acting against a shared notion of liberty. Hence they focused on these policies, the conferral of extraordinary powers, the opposition to the '*senatus consultum ultimum*' and the implementation of land distribution, posing an unwavering resistance on these issues, the importance of which they emphasised. Since their adversaries, who supported these policies, shared the belief presented by the opposition that these measures could indeed have the effect of undermining liberty, it followed that everyone must have found it plausible to believe that to oppose these policies must have been an act in defence of true liberty.

As Skinner has clearly shown, when there is a need to legitimate one's course of action in order to overcome a widely recognised accusation, by choosing to profess the ideal of liberty, those who opposed this measure found themselves in circumstances in which it was rational for them to act in the way they did.⁶⁶ That is to say that once *libertas* was chosen as a means to provide a justification and an alleged motive for this course of action, it limited and thereby also directed the politicians' behaviour in such a way as to make it compatible with this claim. This is therefore one of the reasons why politicians consistently opposed these specific measures, and did so by constantly recurring to the value of liberty.

⁶⁶ Skinner 2002: II 344–67. On Skinner's methodology see Palonen 1999.

Epilogue

In their attempts to legitimate their course of action against the accusations launched by their adversaries, those politicians who opposed the conferral of extraordinary powers, or favoured the use of the '*senatus consultum ultimum*' or resisted the enactment of land distribution resorted to the shared ideal of *libertas* as a way of redescribing their political behaviour in favourable terms.

However, while the bestowal upon an individual of extraordinary powers and the implementation of land distribution could be plausibly represented and thus perceived by all language-users as measures that would lead to the establishment of a state of domination by either an individual or a group from within the commonwealth, the recourse to the '*senatus consultum ultimum*' could (and indeed did) initially generate a certain degree of semantic confusion amongst the members of the linguistic community.

Bearing in mind how little has been preserved of the ideas advocated by those who supported this course of action, on the basis of the extant evidence it appears that in contrast to the bestowal of extraordinary powers and the enactment of agrarian distribution, those who opposed the '*senatus consultum ultimum*' also adopted the agreed principle of *libertas* as a way of characterising their political approach.¹

By appealing to the *lex Sempronia*, which enshrined the *ius provocationis*, one of the basic rights guaranteeing the liberty of Roman citizens, they claimed that no one had 'the power or right of any kind to kill even the most criminal citizen without trial' nor to violate the rule of law, one of the essential means by which liberty was preserved.² Those who supported the '*senatus consultum ultimum*', for their part, claimed that when the

¹ On the ideas advocated by those who supported extraordinary powers, see [Chapter 4](#): 188ff and by those who supported land distribution, [Chapter 3](#): 126ff and 153ff. On the appeal to liberty by those who opposed the '*senatus consultum ultimum*' see [Chapter 4](#): 203ff.

² Cic. *Part. Or.* 30.106. See [Chapter 4](#) on the debate over the '*senatus consultum ultimum*'. On *provocatio* see [Chapter 2](#): 50ff.

safety and preservation of the *libera res publica* was at stake recourse to the '*senatus consultum ultimum*' and the related actions of magistrates were the only effective means to preserve the liberty of the commonwealth. Ultimately, the kernel of the discussion lay in whether the magistrate had the power and right, for the sake of the safety of the commonwealth, to put to death a citizen who, although arguably violent in his behaviour, had not been lawfully found guilty of such violence. Both sides involved in the debate argued that their preferred course of action was the only one able to maintain the status of liberty of Roman citizens.

However, a most important fact to appreciate is that both those who supported and those who opposed the '*senatus consultum ultimum*' did not do so by appealing to different notions of the principle of *libertas*. The politicians involved in this debate did not disagree on the meaning of liberty, but rather on the set of circumstances in which they thought it appropriate for it to be applied.

As Skinner has highlighted, drawing on Hampshire's work, a crucial requisite for a genuine argument to take place is that all those engaged on both sides can claim with a considerable degree of plausibility that all the terms employed to characterise their actions and to present their alleged motives for engaging with the topic are adopted in virtue of their agreed sense.³ Following Hampshire's reasoning, it would be hard to understand how those who opposed the '*senatus consultum ultimum*' could have been content simply to point out that their adversaries made use of a different concept of liberty to advocate the validity of their stance and emphasise its authority. Rather than being involved in a proper argument, which might result in defeat for one of the participants, those who opposed and those who supported this measure would have found themselves confined to 'the largely separated worlds of their thought'.⁴ However, if those who had recourse to the '*senatus consultum ultimum*' in the name of liberty genuinely wished to succeed in affirming their course of action, they needed to persuade their adversaries, as well as the wider audience (understood as the community of the language-users composed, in the first place, of the audience who listened to the debates as well as the readers of the speeches), that the basic notion of *libertas* which they all shared could be appropriately applied to a set of circumstances to which (because of a fault of their own) their opponents had not thought of applying it.

³ Skinner 2002: 1 158–74 and Hampshire 1959.

⁴ Hampshire 1959: 197 (as cited by Skinner 2002: 1 166).

It follows that the politicians involved in the opposing sides of the political debate over the '*senatus consultum ultimum*' did not find themselves disagreeing on the idea of *libertas* as a state of non-domination, the basic meaning of liberty which they all shared, but rather on whether or not the word *libertas* ought to be applied as a description of a state of affairs where the rule of law and, in particular, the right of *provocatio* were not to be upheld.

Drawing upon the account of Skinner, and, in turn, on the work of Hampshire and Wittgenstein,⁵ according to which terms are correctly used when they are applied to a set of circumstances that yield the agreed criteria in virtue of which they are normally employed, it is possible to identify with more precision where the disagreement emerging from the discussion on the recourse to the '*senatus consultum ultimum*' lay.

These politicians disagreed on whether the agreed criteria for the appropriate application of *libertas*, with its favourable force of appraisal, were present in circumstances in which the senate decided, in the name of the safety of the commonwealth, to arrogate to itself the right to support the deployment of any available means in response to a situation of perceived danger, even if this required engaging in actions detrimental to the rule of law and the right of *provocatio*, which were conceived as two of the essential guarantees of Roman *libertas*.

However, the application of the principle of liberty in virtue of its shared meaning by the supporters of the '*senatus consultum ultimum*' went against the socio-political sensitivity of the wider speaking community. Living in a world perceived to be under the firm dominion of Rome, the language-users of the late Republic conceived the rule of law and the protection of the right to *provocatio* to be two of the essential means of guaranteeing the citizens' state of *libertas*. The emphasis that the advocates of the '*senatus consultum ultimum*' placed on the threat posed by the domination of an enemy, whom they could attempt to represent with differing degrees of success as an entity alien to the community, although per se conceptually crucial to the establishment of the commonwealth's state of liberty, was by the first century BC no longer perceived to be in tune with the contemporary political situation.⁶ To the political and linguistic sensitivity of the community, what became hard to understand and thus rather confusing was how, as the supporters of the '*senatus consultum ultimum*' claimed, the right to *provocatio* (which they all recognised as one of the strongholds

⁵ Wittgenstein 1958, Hampshire 1959 and Skinner 2002: 1 158–74.

⁶ See Chapter 3: 76ff.

of liberty) should be trampled on in order to protect the liberty of the commonwealth.

After an initial state of semantic confusion, caused by what may have appeared at first to be an idiosyncratic application of *libertas*, the audience (understood not only as the opponents of the ‘*senatus consultum ultimum*,’ but also as those who gathered in the Forum, in the senate and in *contiones*, as well as the readers of the speeches) was persuaded to accept the fact that *libertas*, with its ordinary meaning, could be applied to a new situation in which they had not previously recognised that it could be applied.

The effect of their persuasion was not initially a change in the meaning of the term *libertas*. Those who supported the ‘*senatus consultum ultimum*’ aimed to persuade their adversaries as well as the wider audience ‘that, in spite of appearances, *libertas* could be properly applied – in virtue of its ordinary meaning – to the case in hand’.⁷ The effect of this successful operation on the part of these politicians was to persuade their interlocutors as well as the wider audience that *libertas*, with its unaltered notion of state of non-domination, could be appropriately applied to a set of circumstances where the rule of law and the right to *provocatio* were not upheld. The result of this successful operation was, in the first place, an alteration of the set of references to which *libertas* could be applied by virtue of its agreed criteria; in the second instance, it consisted of a modification of these criteria themselves, ultimately causing a form of conceptual change.

In fact, if we turn our attention to the meaning of liberty in the 40s BC, we find that according to most extant texts of the time, such as Cicero’s *de officiis* and *Philippicae*, *libertas* seems to have acquired a new moral and universalistic dimension, centred round the *iudicium* of individual men.⁸ Moving away from a juridical notion, the idea of *libertas* no longer implies an emphasis on the rights of Roman citizens (such as, for example, the right to *provocatio* and to *suffragium*) as the guarantors of its establishment and preservation. Although the basic meaning of liberty as a state of ‘non-domination’ had remained unaltered, in the 40s what seems to have shifted is the notion of the means which were regarded as being of primary importance in establishing and maintaining such a state.

In the *de officiis*, the concept of liberty seems to have assumed a new dimension, no longer based on institutional arrangements, but rather

⁷ Skinner 2002: 1182.

⁸ Arena 2007b and most recently Cogitore 2011: 200–2. See also Stacey 2007: 23–72 with particular focus on Seneca. For an earlier elaboration of this idea in previous Ciceronian works see Chapter 4: 215–19.

founded on the moral αὐτάρκεια of virtue; it requires a commitment to what is morally good based on the moral judgment of the individual and control over one's own emotions. Elaborating Greek virtues in Roman terms, Cicero holds that a man is truly free when he acts according to virtue and, above all, justice.⁹ Focusing on what is honourable, the wise man, the only one who is truly free, is the master of his own fears and desires.¹⁰ He will never do anything that he does not judge to be morally good, and will always live according to nature, that is conforming to the universal nature that is reason at work.¹¹ It is reason that directs the wise man in his actions and tells him what he should and should not do, inducing him to behave according to justice and putting forward the common good over his own personal interest in the preservation of human fellowship and bonding.¹² Subjection to fear and desire for glory may induce men to give up their own independence to be subjected to the domination of someone else. By separating the honourable from the beneficial and acting in an exclusive search for the latter, such people not only behave unjustly, but also assume either a subservient attitude out of fear or a position of dominating power out of desire for pre-eminence.¹³

This liberty is no longer related to positive laws, which sometimes can also embody unfair provisions, but rather to the divine natural law, the *ratio* of which the wise man's mind follows. As such, it moves away from the idea of laws as guarantors of liberty *qua* enforcers of the common interest and acquires a new moral value that is closely linked with the direct initiative of the individual. The defence of the liberty of the commonwealth, and, consequently, of the liberty of individual citizens will now rest on the *consilium* and *iudicium* of every citizen politically engaged with the community.¹⁴ The defence of the *res publica* and of its *libertas* is now based on the individual judgement of the citizen, who, in his own soul, will have to reconcile the *honestum* and the *utile* for the community as well as for its individual citizens.¹⁵

⁹ Cic. *Off.* 1.17, 20. Cf. Diogenes Laertius 7.32–3 = SVF 1. 226 and Cic. *Par. Stoic.* 5.34. See the pioneering study by Gabba 1979. Most recently, on the Stoic ascendancy of these ideas see Arena 2007b. On the Stoic idea of freedom see Long 1971 and Bobzien 1998.

¹⁰ Cic. *Off.* 1.62, 1.64, 1.66–70, 2.37–8, 3.118. ¹¹ Schofield 2000.

¹² Cic. *Off.* 1.85–6, 3.26–7, *Fin.* 3.62–3, *Leg.* 1.33. Schofield 1995b and Striker 1991.

¹³ Cic. *Off.* 2.22–4, 3.36.

¹⁴ Cf. Lepore 1954: 377–8, who considers that Cicero first began to modify his idea of liberty in 57–56 BC, in an attempt, so Lepore thinks, to elaborate a concept suitable for the *ordo equestris* but without the group's claims to privilege.

¹⁵ See Schofield 1991: 69: for the Stoics the source of law is internalised, 'making it something like the voice of conscience or (as a still later moral tradition would put it) the moral law within'. Cf. Cic. *Fam.* 2.5.2 (to Curio in 53 BC). Contra Atkins 1990: 281–4 who argues that 'what is truly *honestum*

By its adoption in Cicero's *Philippics*, this idea of liberty came to play a central role in the political struggle against Antony and assumed a prominent place in the political discourse of the convulsed years of 44 and 43 BC. In the *Philippics*, which translate the philosophical tenets of the *de officiis* into the rhetorical terms of the contingent political struggle,¹⁶ Cicero exhorts his fellow citizens, and above all the senators, to recover Roman freedom.¹⁷ He describes Antony as debauched, effeminate and enslaved to the most abject vices.¹⁸ Rather than as a human being, Antony is portrayed as a monster, a savage beast, with whom no form of human fellowship is possible, an alien entity to the community of men, who, as such, should be eliminated.¹⁹ To this end, Cicero exhorts his contemporaries to pursue an active line of virtuous conduct which, rejecting the interference of their own emotions and their consequent reduction to a condition of subservience to an external agent, should induce them to engage actively in the search for the *honestum* and the *utile* for the community, and which in Cicero's opinion should therefore lead them to eliminate Antony, the true enemy of the *libera res publica*.

However, as he elaborates in the *de officiis*, Cicero expects individuals to choose the *honestum* on the basis of their own *iudicium* and *consilium*. He no longer refers to the supreme value of positive laws, which, enacted, at least in theory, by the whole citizen body, represent the will of the whole community. What matters is the *privatum consilium* with which Brutus, Cassius, Octavian and their followers make their decisions in defence of the Republic.²⁰

Brutus and Cassius fight for the liberty of Rome, but, in doing so, they act not in obedience to a senatorial decree, but on the basis of the autonomy of their own judgement: they are their own senate. 'For both Brutus and Cassius have been already their own senate on many things. For we must in such a general upturn and confusion follow the times rather than precedents. And it is not the first time that Brutus or Cassius has regarded the safety and the liberty of their country as the holiest law and

is measured by the needs of the *res publica*, and the law of nature is the law that will preserve the *societas* that our natures desire' (284).

¹⁶ On the close relationship between the *de officiis* and the *Philippicae* see Lepore 1954: 387; on the highly philosophical language of the *Philippicae* see Michel 2003: 640.

¹⁷ Cic. *Phil.* 4.11, 6.19, 8.12, 10.19, 10.20, 13.1–2.

¹⁸ Cic. *Phil.* 3.12.

¹⁹ Cic. *Phil.* 3.29. Cf. Cic. *Phil.* 4.12. On Antonius' condition as slave to emotions see Cic. *Phil.* 1.33–4; cf. 1.29, 2.115, 3.34–5. See Lévy 1998. See Cic. *Phil.* 27 where Cicero congratulates Gaius Trebonius for his part in Caesar's assassination.

²⁰ See Bellincioni 1974: 89–97. According to Gotter 1996: 104 and 243–4 this Ciceronian argument results in an ambiguous sophism. Narducci 2005: 201–3 asserts Cicero's genuine intentions.

most excellent precedent.²¹ Brutus has not taken control over Crete, the province that had been officially assigned to him, but has rather gone to Macedonia and of his own initiative has built up a new army, taken control of the legions already in existence there, and deprived the consuls of their authority on the basis of his own judgement. Similarly Cassius is pursuing his opposition to Dolabella's access to Syria, the province properly assigned to him. Both Brutus and Cassius do not obey human law, but rather the unwritten *ratio* that is the universal principle of nature. As such, in Cicero's opinion, they can inevitably pursue the only possible aim that they share with the senate: the common good.

Thus, once it is established that what is beneficial to the Republic is the supreme goal, it follows that anything that is implemented to pursue it is, by its own nature, legitimate and just, and anything that is opposed to it illegitimate and unacceptable. Even if Antony might possibly have a claim to Macedonia, Cicero argues, he certainly has none to the other provinces, or to the legions of Vatinius, the proconsul in Illyricum. To the opponent who argues that Brutus had none either, Cicero replies that Brutus could rest his claim on much more authoritative foundations, not the laws of men but the moral and absolute justice of his cause in defence of the Republic.

'The one [Antony] had suddenly taken flight to plunder and destroy the allies, so that, wherever he went, he devastated, plundered, and robbed everything, and employed an army of the Roman people against the Roman people itself; the other [Brutus] had laid down this law for himself that, wherever he came, light, as it were, and hope of salvation should seem to have come with him. In short, the one looked for supporters to overcome the commonwealth, the other to preserve it.'²²

Compliance with the higher law transforms Brutus, who has conducted his army *privato consilio* against a consul, into the true *conservator rei publicae*, fighting against Antony, formally a consul but in essence a *hostis* of Rome. 'Antony, not by words, but by deeds, may be adjudged to be not merely no consul, but also a public enemy. For if that man is a consul the legions that have deserted the consul have deserved death by the cudgel, Caesar is a criminal, Brutus is a villain, who of their own motion have levied armies to oppose a consul . . . who is there but must count him an enemy when those who are in arms against him are adjudged saviours of the commonwealth?'²³

In opposition to Antony, against whom in 43 BC he succeeded in securing the passage of a '*senatus consultum ultimum*', Cicero mounts an argument that runs along very similar lines to those previously adopted in support

²¹ Cic. *Phil.* 11.27.

²² Cic. *Phil.* 10.12.

²³ Cic. *Phil.* 3.14.

of this emergency measure, but with one important difference. Antony, a savage enemy, ought to be removed from the community in order to secure the preservation of the *libera res publica*.

However, in order to achieve this aim, Cicero no longer puts emphasis on the fact that all means deemed effective to defeat the enemy should be authorised and accepted when the safety of the commonwealth is at stake. In other words, Cicero's argument of the 40s no longer contains the more or less implicit attempt, made in the 60s and 50s, to justify the disregarding of existing laws in the name of the preservation of the *libera res publica*. In the 40s, in his fight against Antony, Cicero exhorts his contemporaries to act virtuously, resisting the interference of emotions which would lead to the establishment of a state of subservience to external domination, and urges them to engage in the virtuous search for the *honestum* and the *utile* for the community to expel its deviant element. In order to restore its liberty to the *res publica*, Cicero emphasises the crucial role played by individual *virtus*, which should follow the unwritten *ratio* of the universal principle of Nature. Not only will the *praestantes viri* be their own senate, but as individuals they will also take upon themselves the defence of the state, and their example should be followed by all members of the community, above all the reluctant senators. Even the legions have embraced the principle that the senate is still hesitant to follow: 'First of all you praised those commanders who had on their own private judgment undertaken war against him; in the next place the veteran soldiers who, although they had been planted by Antony in colonies, set the liberty of the Roman people before his benefits . . . now one must feel ashamed that the resolutions of the legions are more honourable than the Senate's, since the legions have resolved to defend the Senate against Antony and the Senate resolves to send envoys to Antony!'²⁴ In order to restore a state of *libertas*, it is crucial that each individual develops a commitment to what is morally good.

The notion of liberty adopted in the arguments against Antony in the *Philippics* and philosophically elaborated in the contemporary *de officiis*, had not changed its meaning, which remained at its basic level tantamount to the absence of domination. What had happened as a result of the debate concerning the '*senatus consultum ultimum*' was, in the first instance, that the idea of *libertas*, by virtue of its agreed criteria, was applied to a different set of circumstances in which it was not usually encountered. Only at a second stage, as a result of being applied to a situation to which, according to the agreed usage of the term, it was not usually relevant, *libertas* came

²⁴ Cic. *Phil.* 5.3–4. See also Cic. *Phil.* 5.18; 10.23.

also to vary its criteria of application, and was ultimately subjected to a form of conceptual change. Liberty was no longer guaranteed by civic rights and, more generally, by the rule of law. What guaranteed liberty came to be the moral αὐτάρκεια of virtue based on *privatum consilium*, which was regarded as crucial to direct the actions of each individual towards the benefit of the commonwealth, whose status of non-domination was thus preserved.

The main factors that governed this conceptual change are fully investigated in the analysis which the ancients themselves carried out in their study of the dynamics that governed semantic and linguistic transformations of Latin terms. In the late Republic these same men were also amongst the main political actors of the time and to their analysis I shall now turn.

Varro's *de lingua Latina* provides the most systematic treatment of the evolution of the Latin language, and shows very interesting similarities to the observations in Cicero's *de oratore* made a few years earlier.²⁵ Referring to the meaning of words as the range of criteria to which the word is applied, and to the origins of words as the examination of why and whence words are, in Book 5 Varro distinguishes the first as a domain of what the Greeks call semantics and the latter as the field of what the Greeks call etymology. He specifies that these two matters will be the subject of the following books and, although he will pay less explicit attention to the first, he will not keep them separate and will ultimately treat them as a *unicum*.²⁶ As Schröter has shown, for Varro the study of etymologies was not merely an erudite activity distinct to an antiquarian, but rather an instrument of historical research which allowed him to understand fully the present and participate actively in it: it provided him with a way of thinking, and, as such, could not be dissociated from its corresponding semantic analysis.²⁷

Varro presents a notion of language as an entity in continuous motion: 'the usage of speech,' he states, 'is always shifting its position (*consuetudo loquendi est in motu*)'.²⁸ Lapse of time, he argues, may lead to the disappearance of a word, and new ones may be introduced from a foreign language, whilst those that are still in use from older times may be applied either with a considerable degree of inaccuracy or may have gained a completely different meaning. Varro gives as an example the word *hostis*, which in older times signified a foreigner from a country independent of Roman laws, but

²⁵ Some interesting, although general, remarks in Uhlfeder 1963.

²⁶ Varro *Ling.* 5.2. At 7.1 he explicitly refers to words' changes of meaning.

²⁷ Schröter 1960: esp. 98–100. Piras 1998: 63 underlines the political dimension of Varro's research.

²⁸ Varro *Ling.* 9.17; cf. 7.1–2. Taylor 1974: 50–1.

by the first century BC, had come to indicate an enemy, the person who in the past was indicated by the word *perduellis*.²⁹

In Varro's theory of language, the forces at work to govern these semantic and linguistic changes are *natura*, *analogia*, *consuetudo* and *auctoritas*. These principles can be grouped into two pairs, which in Varro as well as later in Quintilian can be reduced to the basic dichotomy between *analogia* and *anomalia*: on the one hand, the two technical criteria, *natura* and *analogia*, which relate to *ratio*, and, on the other, the other two empirical criteria, *consuetudo* and *auctoritas*, which are connected to *voluntas*.³⁰ 'The *natura* of verbs and nouns,' states the fragment that Diomedes attributes to Varro, 'is immutable and has transmitted to us neither more nor less than it has received. For if anyone says "*scrimbo*" instead of "*scribo*", he is shown to be wrong not by the force of analogy but by the very *natura* of the word. The *analogia* of speech brought forth by *natura* is its arrangement according to grammar-writers: it disentangles barbarous speech from educated in much the same way as one might separate silver from lead. *Consuetudo* is equal to *analogia* not through *ratio*, but through force. It draws this strength from the agreement of a large number of people, but in such a way that the ratio of grammar does not actually give in to it but merely indulge it (*non accedat sed indulgeat*), being wont to adopt forms sanctioned by common usage (*nam ea e medio loquendi usu placita adsumere consuevit*). *Auctoritas* is the final factor in the regulation of speech. Where all else fails, one has recourse to *auctoritas* in the way that one turns at last to an anchor. For no element of *ratio* or *natura* or *consuetudo* is involved when *auctoritas* is received merely as an opinion based on the reading of ancient authors and not on that of those who can explain, if they are asked, why they have followed that route.'³¹

On the one hand, Varro claims, if *natura* provides language with its basic forms, so that it leads individual speakers to distinguish almost intuitively between the correct and incorrect inflection of a word, *analogia*, the realm of the grammarians, provides firm and intellectually sound guidance on correct, rather than fanciful, linguistic forms. On the other hand, his argument continues, *consuetudo* signifies 'the way language is used by various strata or segments of the speech community'.³² It does not derive

²⁹ Varro *Ling.* 5.3. At 5.5 Varro compares linguistic changes to those that occur in a person's life over generations. See also 7.1. Cf. Varro *Ling.* 9.10, 9.16.

³⁰ On this reading of this quadripartite model see Cavazza 1981.

³¹ Varro *GRF* Funaioli 268 = Diom. *Gramm.* 1.439.15ff. and Ch. *gramm.* 62.14ff. = 115 G.-S (trans. by Law 1990: 193). On this fragment see Cavazza 1981: 143–50. See also Collart 1954: 270–5.

³² Taylor 1974: 51. Varro *Ling.* 10.2 states that he will address the question on the nature and definition of *consuetudo*, but in the extant text a sustained discussion about it is absent.

its strength from *natura* or *ratio*, but rather from the *consensus multorum*, and although its foundations are not as strong as those of *analogia*, it is equal to it in its power to govern the evolution of speech. However, although it preserves a state of inherent superiority to *consuetudo*, as it is not supposed to give in to usage, but simply to indulge it (*non accedat sed indulgeat*), *ratio/natura*, in Varro's opinion, is ultimately obliged to comply with the rules dictated by usage. Finally, *auctoritas*, which, according to Varro, may function as a criterion to govern linguistic modifications, draws its force and validity from the individual judgement of recognised authors and, allowing for their arbitrariness in adopting new forms, introduces linguistic changes as a result of their initiative.³³

It follows that, in Varro's opinion, if linguistic changes were governed exclusively by *natura*, the proper communicative function of language would not be fulfilled. Addressed *ad utilitatem*, language, according to Varro, must fulfil the pragmatic function of allowing individuals to communicate with one another. In other words, Varro argues, it does not really matter whether an individual says *Herculi* or *Herculis*, provided that the person who listens has understood that the case in point is a genitive.³⁴ In Varro's opinion, therefore, linguistic changes, although directed in the first instance by *natura*, could not be constrained by it, and the cooperation between *analogia* and *consuetudo* was an essential factor governing such modifications.³⁵ Since for him as well as for Quintilian *ratio* and *consuetudo* corresponded broadly to *analogia* and *anomalia*, it is possible to conclude that for Varro these acted as two driving forces of equal importance and coexisting action in the same linguistic process, rather than representing an antinomy between two mutually exclusive principles.³⁶

As he argues in the *de lingua Latina*, *consuetudo*, the way language was used by the speaking community, should follow regularity (*analogia*) so as to avoid mistaken practices, which often occurred in the common currency of language practised by those to whom Varro refers as the *populus* or *populus universus*.³⁷ Orators and poets, the *omnes singuli e populo*, are endowed with more freedom in the use of language, as they are not expected to use regularity consistently, but are allowed to introduce linguistic innovations on the basis of their judgement. 'Some words and forms,' Varro argues, 'are the usage of the people as a whole (*alia populi universi*), others belong to individual persons (*alia singulorum*); and of these, the words of the orator

³³ Varro *GRF* 268. For an interesting discussion of the rules that govern speech in ancient theories of language, with particular attention paid to Augustine, see Law 1990.

³⁴ Varro *Ling.* 8.25–6. ³⁵ Cf. Varro *Ling.* 10.52–3.

³⁶ Collart 1963: 128, Taylor 1974: 52–3 and Cavazza 1981: 142. ³⁷ Varro *Ling.* 9.5, 10.74.

and those of the poet are not the same, because their rights and limitations are not the same. Therefore the people as a whole (*populus universus*) ought in all words to use regularity (*analogia*), and, if it has a wrong practice, it ought to correct itself; whereas the orator ought not to use regularity in all words, because he cannot do so without giving offence (*quod sine offensione non potest facere*), and on the other hand the poet can with impunity leap across all the bounds.³⁸

However, both the orators and the poets, although the latter possess even more liberty in the use of language than the former, are ultimately dependent on *consuetudo*.³⁹ If, on the one hand, they have the discretionary power to introduce new words and meanings or unusually inflected forms, their ultimate success in imposing them on the way of speaking of the language's users depends on two important factors: first, on the correspondence to the principle of regularity, and second (and most importantly in the actual practice of linguistic change) on the sanctioning of their use by the speaking community, that is, on *consuetudo*.

As Varro argues, a considerable driving force for linguistic change are the poets, especially the dramatists, 'who have a great power in this sphere (*poetae multum possunt in hoc*): they are responsible for the fact that certain words are now spoken with improved inflections, and others with worse'.⁴⁰ However, the people should follow the poets' example only when they advocate a correct usage according to the principle of regularity (*analogia*), as people should not follow bad examples unless this becomes necessary and is forced upon them. As 'Lysippus did not follow the defects of the artists who preceded him, but rather their artistry, so should the people do in their speech, and even the individuals, so far as it may be done without offence to the people as a whole'.⁴¹

However, Varro claims, if the poets should limit their innovations within the parameters imposed by regularity, the constraints imposed by these parameters should, in turn, be subjected to *consuetudo*, to which no offence should be given, since it retains the ultimate force to sanction such changes. If an orator was allowed to implement a linguistic innovation because of his *auctoritas*, his definitive success could be sanctioned only by the people as a whole, understood as the language users. 'One wonders whether words such as *lacrumae* should be written *lacrimae*, or *maxumus* should be written *maximus*, and similar,' asks Cassiodorus in the *de orthographia*,

³⁸ Varro *Ling.* 9.5.

³⁹ Cf. Varro *Ling.* 9.78; 9.114. On the liberty of the poets see Varro *Ling.* 9.17, 9.115 and the discussion in Piras 1998.

⁴⁰ Varro *Ling.* 9.17. ⁴¹ Varro *Ling.* 9.18.

Varro reports that Caesar used to pronounce and write them with an “i” Hence, as a result of the *auctoritas* of such a great man, (*inde propter auctoritatem tanti viri*) it became common usage (*consuetudinem factam*) to pronounce and write them in this way.⁴² Varro envisages similar dynamics for the successful introduction of the singular ‘*cervix*’ and the revealingly failed innovation of the analogical ‘*faux*’. As Varro explains, ‘usage tolerates some words inflected contrary to old practice’ and the possibility of introducing these new inflections is reserved for the orators. Thus, Varro says that Hortensius could use the singular ‘*cervix*’ instead of the customary plural ‘*cervices*’, because common usage could tolerate this new introduction, although, he continues, it could not tolerate the use of ‘*faux*’, analogically modelled on it, and maintained the use of the plural ‘*fauces*’.⁴³

Thus, whilst recognised authors, poets and orators, who are granted greater freedom in introducing linguistic modifications, find in *consuetudo* an important limit to their innovations, the people as a whole should follow *ratio* in order to avoid mistakes. According to Varro’s linguistic theory, in a language in continuous movement, in which often thanks to the initiatives of poets and orators old words are lost and new ones gained, it is important to avoid errors, something that could be achieved only by following *ratio*, which finds its expression in *analogia*. ‘*Consuetudo*,’ as Michel summarises, ‘makes mistakes and in the usage of language it is necessary to make a distinction between good and bad practice. It is necessary to retrieve good usage’,⁴⁴ and the means available to the people to do this, in Varro’s opinion, is to follow *analogia*. However, this corrective practice should also be exercised with great caution: although there are some words common in usage which can be easily eliminated and others that seem firmly fixed, ‘it is proper,’ Varro argues, ‘to correct at once in the direction of logic only those which are lightly attached and can be changed without giving offence’.⁴⁵ Once again, *consuetudo* seems to be the ultimate force able to sanction linguistic changes. Varro expresses this notion in the powerful metaphor of the *gubernator*.⁴⁶ ‘As a helmsman (*gubernator*) ought to obey reason (*ratio*), and each one in the ship (*unusquisque in navi*) ought to obey the helmsman, so the people ought to obey reason, and we individuals ought

⁴² Varro *GRF* 269 = Cassiod. *Gramm.* 7.150.10ff. = 68 G.-S.

⁴³ Varro *Ling.* 10.78. See also Gell. *NA* 10.21.1–2 on Cicero’s reluctance to adopt the superlative *novissimus*.

⁴⁴ Michel 1965: 76. He relates this passage’s emphasis on *ratio* to the first book of Cicero’s *de legibus*.

⁴⁵ Varro *Ling.* 9.16. Cf. Varro *Ling.* 10.74 on *analogia* as not inconsistent with *consuetudo*.

⁴⁶ Cf. Cic. *Rep.* 2.51.

to obey the people (*nos singuli populo*).⁴⁷ Whilst the use of language on the part of the *populus* should be anchored to *ratio* (within the limits deemed acceptable) in order to preserve it from mistakes, so individuals, chiefly orators and poets, should follow *consuetudo*, the way language is used by the speaking community: 'the people has power over itself (*populus enim in sua potestate*),' Varro claims, 'but individuals are in its power (*singuli in illius*) . . . I [the individual] am not the master – so to speak – of the people's usage, but it is of mine (*ego populi consuetudinis non sum ut dominus, at ille meae est*).'⁴⁸

An important fact to appreciate is that a very similar relation between *consuetudo* and *auctoritas* is articulated in another late Republican work of a few years earlier, Cicero's *de oratore*, which although on the whole of a different nature, displays considerable similarities with Varro's *de lingua Latina*.⁴⁹ In the *de oratore*, Cicero makes Crassus assign the orator an important role in governing linguistic change. The three fields that Crassus recognises as spheres of innovation proper to the orator are 'rare words, new coinages, and words used metaphorically'.⁵⁰ The orators and the poets, to whom a greater liberty is assigned, are allowed to use 'rare words, usually archaisms which because of their antiquity have long passed out of use in everyday speech', to add grandeur and antiquity to their style.⁵¹ They are also expected to coin new vocabulary either by combining words together such as '*expectorat*' or '*versutiloquas*' or simply by their own invention as attested by '*senius desertus*', '*dii genitales*' and '*bacarum ubertate incurvescere*'.⁵² Third, they are also expected to resort to the use of metaphors as a way of clarifying the meaning of words otherwise obscure, by borrowing another term whose meaning is instead fully recognised. However, Crassus argues, these artifices, and many more to which he alludes, although introduced and initially accepted by virtue of the orator's *auctoritas*, find in the *consuetudo communis* a severe constraint on their successful adoption in everyday language. All the linguistic changes that

⁴⁷ Varro *Ling.* 9.5–6. ⁴⁸ Varro *Ling.* 9.6.

⁴⁹ On the relation between Cicero and Varro in their analysis of language see Garbarino 1978: 162–73. Varro, who dedicates Book 5 of the *de lingua Latina* to Cicero (*Ling.* 5.1 and Gell. *NA* 16.8) would have liked to be included in Cicero's *de oratore* as one of the discussants: Cic. *Att.* 4.16.2. Cf. Della Corte 1970: 95.

⁵⁰ Cic. *De or.* 3.152.

⁵¹ Cic. *De or.* 3.153. On the poets' higher degree of liberty, a recurring theme in Varro's *de lingua Latina*, see also Cic. *De or.* 1.70 and *Orat.* 201–2 and 68. Cf. Quint. *Inst.* 8.6.19 on the fact that poets have more freedom.

⁵² Cic. *De or.* 3.154. On the recurrence of the same examples in Varro's *de lingua Latina* and Cicero's *de oratore* see Lebek 1970: 26–33. Piras 1998: 104, n.182 regards the idea of a common source as improbable.

the orator introduces find their acceptance and ultimate sanction in the usage of the speaking community. 'The words may either be archaic,' Crassus argues, 'but at the same time acceptable to habitual usage (*consuetudo*); or a coinage made by compounding two words, or inventing a new one – and here similarly,' Crassus continues, 'consideration must be paid to what our ears are used to (*in quo item est auribus consuetudinique parendum*); or used metaphorically – a most effective way of introducing spots of high light to give brilliance to the style.'⁵³

It follows that the important role in linguistic change assigned to *consuetudo*, although probably of Greek descent, had become very much embedded in the Roman way of thinking of the late Republic.⁵⁴ Attested in Cicero in the mid 50s BC, and elaborated fully by Varro in his theory of language approximately ten years later,⁵⁵ it is also preserved in Quintilian's work a century later. Adopting Varro's quadripartite canon (although substituting *analogia* with *antiquitas*), in the *Institutio Oratoria* Quintilian asserts that of the four guidelines (*loquendi regulae*) that distinguish between linguistic correctness and linguistic fault, *consuetudo* is the most decisive factor.⁵⁶ Informed by a pragmatic attitude, which leads him to investigate the criterion that should be followed when aiming at correctness of speech, Quintilian reaches the conclusion that *ratio*, or rather *analogia*, is no more than a manifestation of *consuetudo*, which thereby should be regarded as the true engine of linguistic change. 'When men were created,' Quintilian argues, 'analogy was not instantly dispatched from heaven to give them a *forma eloquendi*; it was invented after they began to speak, and noticed how things functioned in speech. It relies therefore not upon *ratio* but on example; it is not prescriptive of speech, but descriptive, since nothing creates analogy except *consuetudo*.'⁵⁷

If *analogia* derives from *consuetudo*, *auctoritas*, 'the judgment of a supreme orator, is placed on the same level as reason, and even error brings no disgrace,' Quintilian argues, 'if it results from treading in the footsteps of such distinguished guides'.⁵⁸ However, Quintilian goes on to specify, although it may appear that one cannot make mistake by using the words of the great authorities, this is not actually the case, as the words of their invention that one should adopt are those which they have persuaded

⁵³ Cic. *De or.* 3.170. See also Fantham 2004: 267–9.

⁵⁴ On the Greek origin of this model see Cavazza 1981: 143–4.

⁵⁵ On the date of composition of Varro's *de lingua Latina* see Piras 1998: 37.

⁵⁶ On Quintilian's canon and its difference from Varro see Cavazza 1981: 142–5. Later grammarians adopt a tripartite canon: *ratio*, *auctoritas* and *consuetudo*; see, for example, Mar. Victorin. *Gramm.* 189, 2 and Prob. *Inst. Gramm.* 4.47.19GL.

⁵⁷ Quint. *Inst.* 1.6.16. ⁵⁸ Quint. *Inst.* 1.6.2.

the speaking community to use. 'Although the use of words transmitted to us by the best authors may seem to preclude the possibility of error, it is important to notice not merely what they said, but what words they succeeded in sanctioning.'⁵⁹ Although Cato, an orator of great *auctoritas*, introduced terms such as *tuburchinabundus* (voracious) or *lurchinabundus* (guzzling), and Pollio used *lodices* (blankets) as if masculine, and Messala the plural *gladiola* (small swords), none nowadays, Quintilian claims, would dare to use them or consider them correct Latin. It follows that of the words created by recognised authors of great *auctoritas*, only those that the wider speaking community endorses in their daily usage should be adopted. 'The surest pilot in speaking,' Quintilian argues, 'is *consuetudo*, and we should treat language as currency minted with the public stamp.'⁶⁰ This is the factor that sanctions and legitimates the successful operation of the orator's linguistic innovation and recognises new usages as well as new words.

According to these ancient thinkers, the way language is used by the speaking community derives its force not from its conformity to *ratio*, but rather from the *consensus multorum*. Varro identifies these *multi*, in whose hands resided the power of sanctioning the use of new words in current language, on the basis of their level of literacy. They were those, Varro claims in his discussion of the four levels of etymological explanation, who were able to recognise the etymology of those words he classifies as *verba aperta* or *perspicua*, such as, for example, the names of artisans, that derive from the noun of their corresponding art (such as *nomenclator* and *monitor*), or the composite nouns of immediate recognition and transparency, such as *argentifodina* and *viocurus*.⁶¹ 'Who does not see,' Varro asks, 'the sources of *argentifodinae* ("silver-mines") and of *viocurus* ("road-overseer")?'⁶² This is the lowest level of etymological explanation 'to which even the *populus* has come', since it does not require any level of linguistic sophistication, but rather a basic, almost intuitive, understanding of one's own language which makes one immediately perceive the elements that comprise a compound noun.

It follows that, in Varro's opinion, the *populus*, the *multi*, at times also referred to as the *Forum*,⁶³ constituting the wider speaking community who might have attended public meetings or heard about their subject-matter

⁵⁹ Quint. *Inst.* 1.6.42. ⁶⁰ Quint. *Inst.* 1.6.2–3; cf. 9.3.3.

⁶¹ Varro *Ling.* 7.82; on the artisans' names see 5.93–4. Schröter 1960: 769–87, esp. 778.

⁶² Varro *Ling.* 5.7. Cf. Cic *Acad.* 2.30. On the four levels of etymological explanation see Pfaffel 1981 and the excellent treatment by Piras 1998: 57–125.

⁶³ See, for example, Varro *Ling.* 9.17.

by rumours, included a wide variety of people, who, although not illiterate, may have possessed a rather lower level of literacy than that expected of a restricted elite, composed of orators and other intellectual authorities. This more elite group, who had access to knowledge of grammar and philosophy, possessed, according to Varro, the necessary expertise for the next two levels of etymological interpretation.⁶⁴ However, although it was in a position to propose the adoption of a new word or a new application of a well-known term, this restricted group did not possess in itself the power of sanctioning the successful use of these terms, but rather depended on the *consensus multorum*.

The way in which the *multi* adopted the language exposed it, in practice, to the potential inclusion of incorrect forms and errors. While Varro attempts to remedy this problem by anchoring *consuetudo* to *ratio*, which the people, *gubernator* of the ship, should follow, a century later, Quintilian, declaring uncontested the primacy of *consuetudo*, tries to achieve the same aim by restricting the nature (and the number) of those on whose consensus the *consuetudo sermonis* should be based. *Consuetudo* should not be defined, Quintilian argues, as the practice of the majority, since the masses are not usually pleased by what is right, as the practice of drinking in excess at the baths clearly shows. 'So too in speech,' Quintilian continues, 'we must not accept as a rule of language words and phrases that have become a vicious habit with a number of persons.' Leaving aside the language of the uneducated, which is inevitably filled with mistakes, he claims, the entire crowd gathered in a theatre often commits barbarisms in the cries which they utter as one man. It follows, Quintilian concludes, that the *consuetudo sermonis* which should function as a guideline for correct speaking is the agreed practice of educated men, the *consensus eruditorum*.⁶⁵ This move, an attempt by Quintilian to preserve *consuetudo*, the driving force of linguistic changes, from mistakes, was not very successful. An overly artificial method, which contravened the practice of the use of language, it was dropped by later theorists.

The *Ars Breuiata*, attributed to Augustine, seems to hold the belief that language is of a rather arbitrary nature and derives its validity not from *ratio*, but rather *auctoritas* and *consuetudo*. If *ratio*, through *analogia*, may induce the language users to adopt certain systematised forms, the *auctoritas* of recognised authors, in Augustine's view, allows for the use of novel terms or deviant inflections. However, whatever these illustrious authors propose has no chance of becoming successfully part of mainstream language if

⁶⁴ On this see Piras 1998: 70.

⁶⁵ Quint. *Inst.* 1.6.44–5.

not approved by the *consuetudo*, the way in which language is used by the vast majority of the speaking community.⁶⁶ Discussing the forms of the pronouns *noster* and *vostrum*, Augustine claims that, although adopted by Cicero, whose *auctoritas* is usually undisputed, the forms *nostras* and *vestras* had not succeeded in establishing themselves as common currency in the language of his time. Although supported by an author of such calibre, Augustine argues, these forms had been opposed by *consuetudo imperitorum*, the way in which ignorants adopt language, and as such had been rejected.⁶⁷

With the exception of Quintilian, *consuetudo* as one of the *regulae loquendi* was conceived as the way in which language was used by a wider group of people than the *eruditi* alone.⁶⁸ In the late Republic, Varro explicitly identified it with the common usage of the language on the part of the majority of people (although not the completely uneducated) who possessed that *medius loquendi usus* that allowed them, for example, to understand immediately the constituent parts of compound names. Their consensus was regarded by the ancient authors as the ultimate engine of linguistic change.

By accepting that *libertas*, in virtue of its agreed meaning, could be applied to a situation where the rule of law was not upheld, the people fulfilled the decisive role that contributed to the ultimate conceptual change undergone by *libertas*. In the political debate regarding the ‘*senatus consultum ultimum*’, where one plausible description of current affairs was rhetorically substituted with another, equally plausible, description, Cicero, Varro and the other ancient theorists argue that the decisive factor leading to the prevalence of one description over the other must be identified in the speaking community, constituted, in the first place, of those who attended meetings and read the speeches.⁶⁹ The *auctoritas* of the orators who, in the discussions on the ‘*senatus consultum ultimum*’, applied *libertas* to a state of affairs where it was not at first expected, preceded the operation of *consuetudo* of the speaking community, which, by accepting this new application of the term, sanctioned its conceptual change.

⁶⁶ For a detailed analysis of Augustine’s view see Law 1990. ⁶⁷ August. *Ars br.* 3.25.

⁶⁸ Varro refers here to the *communis consuetudo* which he distinguishes from *consuetudo apud poetas*. Krafft 1969: 309–11. For the difference in Varro between *consuetudo* as the usage of the people and *usus* as abstract notion, see Piras 1998: 98, n.162.

⁶⁹ Here I am drawing on Skinner’s methodology on conceptual change (Skinner 2002: 1158–87). For a difference between Skinner’s approach to conceptual change, very much in line with that of the ancient authorities, and that of Koselleck, as exemplified, for example, in Koselleck 1985 and 1989, see Richter 1995 and Palonen 1999: 41–59.

However, by doing so, not only did the people (in the sense of language-users) make the world around them intelligible, but also, and more importantly, prompted a positive view of a state of affairs where the rule of law was not upheld, rendering it now worthy of praise. What took place was a change in social perception: by embracing the rhetorical description of those who supported the '*senatus consultum ultimum*', the speaking community legitimated actions that earlier on had attracted strong criticism.

By endorsing the exclusion of the objectivity of law as an entity above anyone's judgement which those who supported the '*senatus consultum ultimum*' advocated, the people opened a very dangerous breach in the intellectual world of the Republic, which contributed to the ideological premises for its fall.⁷⁰ Adopting this new set of ideas, Cicero was able not only to justify the pre-eminence of Octavian, but also to commend his actions in defence (as he claimed) of the common good, and the preservation of the *res publica* was justifiably entrusted to the private initiatives and resources of only one man. 'Gaius Caesar, who, by his zeal, his policy, and lastly by the contribution of his patrimony, has protected and is protecting the commonwealth and your liberty, has been honoured by the senate with the highest commendation.'⁷¹ The acceptance on the part of the language-users of this new use of the notion of *libertas*, that is the *consuetudo* based on the *consensus multorum*, resulted in the legitimation of a political behaviour which, by making Octavian's actions ideologically possible, ultimately acted as one of the engines of social and political change.

⁷⁰ See Magdélain 1947: 22–4 according to whom Cicero now justifies illegal methods under the banner of the defence of legality.

⁷¹ Cic. *Phil.* 4.2; see also 3.5.

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